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| DONNA L. SOTO, ADMINISTRATRIX | ) | SUPERIOR COURT |
| OF THE ESTATE OF VICTORIA L. | ) | |
| SOTO, DECEASED, ET AL. | ) | J.D. OF FAIRFIELD/BRIDGEPORT |
| | ) | @ BRIDGEPORT |
| v. | ) | |
| | ) | |
| BUSHMASTER FIREARMS | ) | |
| INTERNATIONAL, LLC, ET AL. | ) | June 10, 2016 |

**REMINGTON'S REPLY MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION TO STRIKE PLAINTIFFS' FIRST AMENDED COMPLAINT**

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## INTRODUCTION

The arguments made by Plaintiffs in their Objection are a strained effort to evade the immunity provided to firearm manufacturers by the Protection of Lawful Commerce in Arms Act ("PLCAA") and to defy its fundamental purpose – to protect firearm manufacturers engaging in *lawful commerce in arms* from the burden of defending themselves in court whenever a criminal misuses a firearm and causes harm. Under the guise of interpreting the statute's plain language, Plaintiffs actually seek to nullify the PLCAA's purpose and application, and stretch Connecticut law beyond recognition. Despite Plaintiffs' efforts to distort and ultimately nullify PLCAA immunity, the legal issue in this case is straightforward: have Plaintiffs stated a permissible and legally sufficient claim against Remington, the manufacturer of one of the firearms used by Adam Lanza to murder 27 persons and take his own life? They have not.

Plaintiffs' case against Remington fits squarely within the protections provided to firearm manufacturers under the PLCAA. Plaintiffs' concession that the firearm involved in the shooting was "legal to sell" and "lawfully sold" removes any doubt and requires an end to this case against Remington. (Obj. at 35.) Indeed, Plaintiffs' concession was inevitable because the Connecticut General Assembly had deemed it lawful in 2010 to manufacture and sell the firearm for civilian use. Remington is thus immune from the claim that it acted unlawfully by simply manufacturing the firearm and making it available to Connecticut residents through federally-licensed and regulated channels of firearms commerce. Under separation-of-powers principles, neither courts nor juries may disregard federal and state firearms law and policy to find that a firearm manufacturer's lawful acts were tortious.

## ARGUMENT

### A. Plaintiffs' negligent entrustment action against Remington is legally insufficient.

No amount of rhetoric from Plaintiffs should cloud the plain language of the PLCAA and

frustrate congressional intent to protect firearm manufacturers from claims that they negligently entrusted lawfully manufactured firearms that were later used by criminals to cause harm.

**1. Plaintiffs have not alleged that Remington acted as a "seller" of the firearm, as the term is defined in the PLCAA.**

Plaintiffs have been aware of the import of the statutory definition of "seller" since they filed their original Complaint, alleging that both Camfour and Riverview Sales were "qualified product sellers within the meaning of 15 U.S.C. § 7903(6)." (Comp. at ¶¶ 30, 34.) And before filing their First Amended Complaint, Plaintiffs were aware the negligent entrustment exception to PLCAA immunity was only applicable to those who are statutorily-defined under the PLCAA as a "seller." (DE #101 at Doc. 28, p. 2 (Ltr. to Dist. Judge Chatigny, 2/17/2015) 3:15-CV-00068, Dist. Conn.) Yet Plaintiffs did not allege in their First Amended Complaint that Remington was a statutorily-defined "seller" of the firearm involved in the shooting. (*See* DE #139 at 3 n. 4.)

Plaintiffs now concede that a firearm "seller" under the PLCAA is a carefully and fully-defined term. (Obj. at 19.) The statutory definition of a "seller" has multiple parts. Initially, whether the defendant acted as a "seller" must be examined "with respect to" the specific firearm involved in the case, not whether the defendant could be characterized as a seller of firearms, generally. 15 U.S.C. § 7903(6)(B). Next, the firearm's "seller" (1) must have sold the firearm as "a dealer (as defined in Section 921(a)(9) of Title 18) who [was] engaged in the business as such a dealer," and (2) must have been "licensed to engage in business as such a dealer under Chapter 44 of Title 18." *Id*.

**i. Plaintiffs have not alleged that Remington sold the firearm under a federal firearms dealer license.**

Plaintiffs have not alleged that the firearm involved in the shooting was sold by Remington under a federal firearms dealer license. Plaintiffs do not even address this obvious legal insufficiency in their Objection. The allegation is essential because it impacts whether Remington

receives statutory immunity against being sued for negligent entrustment at all. *See Cahill v. Board of Education*, 198 Conn. 229, 236 (1985) (When an "essential allegation" has not been pleaded, it "may not be supplied by conjecture or remote implication"). Plaintiffs' failure to plead that the firearm was sold by Remington under a federal firearms dealer license is not a mere technical deficiency, and requires that Plaintiffs' negligent entrustment claim be stricken.[1]

**ii. Plaintiffs have not alleged Remington sold the firearm while "engaged in the business" as a firearms dealer.**

Plaintiffs also do not allege that Remington was "engaged in the business" as a licensed dealer where the firearm was manufactured by "selling firearms at wholesale or retail." 18 U.S.C. § 921(a)(11)(A). "Engaged in the business" has its own definition, principally requiring an allegation that Remington sold the firearm as part of business activity devoted to dealing in firearms "through the repetitive purchase and resale of firearms." 18. U.S.C. § 921(a)(21(C). It cannot be reasonably inferred from Plaintiffs' allegations that Remington sold the firearm while "engaged in the business" as a firearms "dealer."

Plaintiffs' argument that allegations that Remington "sells" firearms and has "sold" firearms are nevertheless legally sufficient should be rejected. (Obj. at 19-20.) If these allegations were sufficient, every "manufacturer" would also be a "seller" and the distinction made in the PLCAA between the activities of "manufacturers" and "sellers" would be lost. For purposes of this case, a "manufacturer" and a "seller" of a firearm are mutually exclusive, because Remington

[1] Perhaps Plaintiffs chose to not allege in their First Amended Complaint that Remington sold the firearm under a federal firearm dealer license (Type 01) because they knew they could not do so in good faith. The federal firearms licenses issued by the ATF cover only specific business premises. 27 CFR. § 478.50 (Pertinent sections of the Code of Federal Regulation are attached collectively as Exhibit A.) Thus, a business with multiple locations must have multiple federal firearms licenses, and if different types of licensed business activities take place at different locations, different license types are required at each location. A licensed manufacturer is able to transfer the firearms it manufactures from its manufacturing premises under its manufacturer license. 27 CFR § 478.41. Here, the firearm was sold by Remington from its manufacturing facility in Maine under a Type 10 Manufacturer of Destructive Device license, not a Type 01 dealer license. However, for the purposes of Remington's Motion to Strike, the question is not whether Plaintiffs can show Remington transferred the firearm under a Type 01 dealer license but whether they failed to allege that Remington did so. They clearly have not.

could not simultaneously be the "manufacturer" of *the* firearm and the "seller" of *the* firearm, purchased from another for "resale." Plaintiffs argue that this reading of the statutory definition of "seller" is "strained" and "defies common sense" (*id*. at 19), but it is the only reading that is faithful to the definition as plainly written.[2]

**2. The transfer of a lawfully manufactured firearm by a federally-licensed firearm manufacturer to a federally-licensed wholesale distributor cannot constitute a "negligent entrustment" as a matter of law.**

Plaintiffs have set up a strawman argument by asserting that Remington argued that a firearm "use" under the PLCAA definition of negligent entrustment "can only mean using to inflict injury." (Obj. at 26.) Remington has not made this argument. Rather, Remington's position is that the entirely legal transfer of a lawfully manufactured firearm from one federal firearms licensee to another in lawful commerce cannot constitute an actionable firearm "use" without making all commerce between federal firearms licensees acts of negligent entrustment. The distinction in the PLCAA between statutorily-defined "manufacturers" and "sellers" illustrates this point: By limiting "negligent entrustment" actions to actions against firearm "sellers," Congress clearly did not intend that legal transfers of lawfully manufactured firearms between federal firearms licensees would be actionable. After all, the aim of the PLCAA was immunize manufacturers and sellers from suit when criminals misuse firearms and cause harm, not to expose them to wholly unrecognizable theories of liability. 15 U.S.C. §§ 7901(a)(5), (a)(6), (a)(7).

Plaintiffs' expansive interpretation of a firearm "use" under the negligent entrustment exception also creates the potential for absolute liability on the part of firearm "manufacturers" and "sellers," based only on their federally-licensed and regulated involvement in lawful

[2] Underscoring this distinction is the fact that, while retail dealers of firearms and ammunition have been sued for alleged negligent entrustment under the PLCAA exception, Remington is not aware of any firearm manufacturer that has been sued for negligently entrusting a product. Indeed, Plaintiffs have failed to cite a single case of alleged negligent entrustment against the manufacturer of *any product*. Plaintiffs' negligent entrustment claim against Remington is unprecedented for good reason: it is prohibited by the PLCAA. *See* 15 U.S.C. § 7903(5)(A)(ii).

commerce. If accepted, Plaintiffs' interpretation of "use" will open the litigation floodgates that the PLCAA was specifically enacted to close. The consequence of Plaintiffs' expansive interpretation of "use" is not in any sense "alarmist," as Plaintiffs contend. (Obj. at 35.)

Plaintiffs create yet another strawman by attributing to Remington the argument that "every dispute as to the meaning of the PLCAA must be resolved" in Remington's favor. (Obj. at 35.) Plaintiffs put forward this the strawman as a means to invoke the rule that statutes that appear to abrogate the common law should be presumed to preserve it, "*except when a statutory purpose to the contrary is evident*." *Id.* (citing *Attorney General of Canada v. R.J. Reynolds Tobacco Holdings, Inc.*, 268 F.3d 103, 127 (2d Cir. 2001) (emphasis added)); *see also Chadra v. Charlotte Hungerford Hosp.*, 272 Conn. 776, 789, 865 A.2d 1163 (2005) (noting that the presumption that the legislature does not intend to eliminate a common law right is overcome by clearly expressed legislative intent). Plaintiffs' reliance on this presumption is inapt because in enacting the PLCAA, Congress clearly intended to limit the types of actions that could be brought against firearm manufacturers and sellers. *See* 15 U.S.C. §§ 7901(b)(1), (b)(4) (Primary purposes of the PLCAA were "[t]o prohibit causes of action against manufacturers, distributors, dealers and importers of firearms" and "[t]o prevent the use of such lawsuits to impose unreasonable burdens on interstate and foreign commerce."). This, together with the rule that statutory exceptions are to be construed narrowly to preserve a statute's fundamental purpose, compels only one conclusion: the "negligent entrustment exception" to firearm "seller" immunity does not accommodate Plaintiffs' expansive interpretation of "use" to include legal transfers of lawfully manufactured firearms between federal firearms licensees. *See Commissioner v. Clark*, 489 U.S. 726, 739 (1989).

**i. The "class" of persons who may lawfully purchase and own firearms in Connecticut has been established by the federal and state legislatures.**

Plaintiffs argue that whether civilians in Connecticut—as a class of persons—are

appropriate owners of the type of firearm involved in the shooting is "deeply fact-intensive." (Obj. at 7.) According to Plaintiffs, courts and juries should be tasked with deciding whether adult civilian residents of Connecticut—who have (a) applied to purchase a type of firearm that is lawfully manufactured and owned, (b) been found legally qualified by the Connecticut Department of Public Safety ("DPS") to purchase and own the firearm, and (c) who do not provide actual or constructive notice to the seller that they are unfit to purchase and own the firearm—should nevertheless be treated as members of a "class" of incompetent persons who will likely misuse the firearm and cause an unreasonable risk of injury. The entire frame-work of Plaintiffs' argument has no basis in the law and, if accepted, would turn the separation of powers between the branches of government on its head.

The legislative branches of the federal and state governments have decided what "classes" of persons may and may not own firearms. *See, e.g.*, 18 U.S.C. § 922(b)(1) (persons 21 years of age eligible to purchase pistols and revolvers); 18 U.S.C. § 922(g) (convicted felons, fugitive from justice, unlawful drug users, persons adjudicated mentally defective, illegal aliens, persons dishonorably discharged from the military, persons who have renounced their citizenship, persons who subject to certain restraining orders and persons convicted of misdemeanor domestic violence crimes ineligible); Conn Gen. Stats. § 29-36f (prescribing categories of persons not eligible to purchase pistols and revolvers). The legislative branches of government have also decided what types of firearms may and may not be owned by *any civilians*. *See, e.g.*, 26 U.S.C. § 5801 *et seq.* (restrictions on ownership of short-barreled shotguns and rifles and machine guns); Conn. Gen. Stats. § 53-202 (machine guns); Gen. Stats. § 53-202a (specific models of semi-automatic rifles and other semi-automatic rifles and semi-automatic shotguns having specified design features). The executive branches of government are charged with enforcing these laws and regulations. *See,*

*e.g.*, Conn. Gen. Stats. § 29-36i (verification by DPS of eligibility or persons to receive or possess firearms); 28 CFR 25.6(b) (FBI NICS background checks).

In 2010, Nancy Lanza purchased a type of firearm that was legal to manufacture, purchase, own and use in Connecticut. If an entirely new "class" of persons is to be declared ineligible to own firearms, or an entirely new "class" of firearms is to be deemed unlawful to own, the legislature is best-suited to make those policy decisions, within constitutional limits. It is not the role of courts or juries to rewrite the expanse of existing federal and state firearms laws and policies established by legislative bodies. (*See* Remington's Memo, DE #149 at 4-6.)

Realizing the separation-of-powers problem inherent in their request to have courts and juries decide that "civilians" are categorically ineligible to own a type of firearm, Plaintiffs choose to ignore the issue. Instead, they rely only on the 85-year-old decision in *Burbee v. McFarland*, 114 Conn. 56, 157 A. 538 (1931), asserting that Connecticut law would countenance a negligent entrustment action based only on an allegation that the person entrusted with a product belongs to a broad class of untrustworthy persons. (Obj. at 9, 13.) Plaintiffs' reliance on *Burbee* is misplaced. First of all, *Burbee* was not a "negligent entrustment" case, but rather an ordinary negligence case. 114 Conn. at 57. Secondly, the defendant's negligence was premised on his disregard of a warning on the box of explosives to "not sell" them to children. *Id*. at 58. Thirdly, the explosives were found to be an "inherently dangerous instrumentality" because they were "so dangerous" that when used for their intended purpose "injury therefrom might reasonably be expected" unless "special precautions were taken." *Id*. at 60. No Connecticut court has held that firearms are inherently dangerous instrumentalities. Lastly, the court in *Burbee* did not hold that the defendant was negligent in selling the explosives simply because the buyer belonged to a class of children. Rather, the court held that "[i]f one sells a dangerous article or instrumentality … to a child whom

he knows or ought to know to be, by reason of youth or inexperience, unfit to be trusted with it, and who might innocently and ignorantly play with it and use it to his injury," liability may result. *Id*. at 59. The jury was asked to consider the competence of the specific child – not simply his membership in a general class of children. *Id*. at 60. *Burbee* cannot be read to establish a rule that a supplier of chattels in Connecticut can be liable for negligent entrustment simply because it sold goods to a member of a broad "class" of allegedly incompetent persons.

**ii. Non-Connecticut negligent entrustment cases do not support Plaintiffs.**

Plaintiffs do not cite to any Connecticut decision recognizing a negligent entrustment cause of action against a product manufacturer based on "successive entrustments" to a remote downstream buyer.[3] Plaintiffs' reliance on what they characterize as the "common law meaning of use" from non-Connecticut cases fares no better. (Obj. at 31-35.)

Two of the cases cited by Plaintiffs apply New York law. In *Earsing v. Nelson*, 212 A.D.2d 66 (1995), the court affirmed dismissal of a "negligent entrustment" action against an air-rifle manufacturer because there was no basis on which to impute the knowledge possessed by the retail seller to the manufacturer regarding the propensity of the child to use the product unsafely. *Id*. at 70. Dismissal of the manufacturer was the logical result because a manufacturer was not in the position to assess the competency of the purchaser. In *Rios v. Smith*, 95 N.Y.2d 647, 654 (2001), the plaintiff alleged that a father knew that the ATV that he entrusted to his son would be

[3] Under Connecticut law, liability for negligent entrustment requires that the defendant provide the chattel for the use of another "when he knows or ought reasonably to know that the one to whom he entrusts it is so incompetent to operate it, by reason of inexperience or other cause, that the owner ought reasonably to anticipate the likelihood that in its operation injury will be done to others." *Greeley v Cunningham*, 116 Conn. 515, 165 A. 678, 679 (1933); *Turner v. American Dist. Tel. & Messenger Co.*, 94 Conn. 707, 110 A. 540, 543 (1920) (knowledge of the entrustee's recklessness is a "vitally important" element of the claim); *Mesner v. Cheap Auto Rental*, No.CV075009039S, 2008 Conn. Super. LEXIS 352, *12 (Conn. Super. Feb. 13, 2008) ("Connecticut law is clear that liability can only be imposed if the defendant entrusts the vehicle to the driver."); *Johnson v. Amaker*, No.CV075013242S, 2008 Conn. Super. LEXIS 243, *9-10 (Conn. Super. Jan. 29, 2008) (Bellis, J.) ("a principle feature of a cause of action for negligent entrustment is the knowledge of the entrustor with respect to the dangerous propensities and incompetency of the entrustee."); *Bryda v. McLeod*, No.CV030285188S, 2004 Conn. Super. LEXIS 1837, *7 (Conn. Super. July 12, 2004) (granting motion to strike).

used by the son's friend, who the father allegedly knew had used the ATV dangerously in the past. In contrast, Plaintiffs here do not allege that Remington was aware of how Nancy Lanza would "use" the firearm, or that she would use it unsafely years after she bought it from Riverview Sales.

Two of the cases relied on by Plaintiffs apply Arkansas law, where there are five elements of a negligent entrustment action, none of which require an allegation required under the PLCAA – specifically, that the person to whom the product is supplied must be the same person who uses the product to cause a risk of injury. *See Collins v. Arkansas Cement Co*., 453 F.2d 512, 514 (8th Cir. 1972); *LeClaire v. Commercial Siding & Maintenance Co*., 308 Ark. 580, 582 (1992). (Obj. at 32-33.) In contrast, Plaintiffs here must plead and prove that Remington knew or reasonably should have known that Camfour, the wholesale distributor to which Remington supplied the firearm, was "likely to" and did "use" the firearm "in a manner involving an unreasonable risk of physical injury." 15 U.S.C. § 7903(5)(B).[4] Yet Camfour's purported "use" of the firearm was only to legally transfer it to Riverview Sales, another federal firearms licensee.

If mere legal transfers of lawfully manufactured firearms between federal firearms licensees can constitute negligent entrustments because they create "risk of physical injury," such transfers would surely be illegal. But they are not. Thus, the transfer of the firearm by Camfour to Riverview Sales cannot be the basis for a negligent entrustment action *against* Remington as a matter of law.

*Schernkau v. McNabb*, 20 Ga. App. 772 (1996), another case relied upon by Plaintiffs, was an ordinary negligence case, not a negligent entrustment case, as Plaintiffs represent. (Obj. at 33.) A parent permitted her son to bring an air rifle to a summer camp, and the rifle was used by another

[4] Plaintiffs have not disagreed with Remington's position that, under basic federal "preemption" principles, the technical minimum (*i.e.*, "floor") requirements of a negligent entrustment claim are set by the definition in § 7903(5)(B). (*See* DE #149 at 13-14 (citing leading U.S. Supreme Court cases on federal preemption of state tort law).)

to cause injury. A Georgia court held that it was error to grant summary judgment based on a finding that parent's negligence was not a proximate cause of a shooting because "in the exercise or ordinary prudence" the parent might have foreseen the consequence of her actions. *Id*. at 773.

In contrast, Plaintiffs cannot plead an ordinary negligence claim against Remington, incorporating general foreseeability concepts, because the PLCAA *does not* provide an exception for ordinary negligence actions. *See* 15 U.S.C. § 7903(5)(A)(i)-(vi); *Ileto v. Glock, Inc.* 565 F.3d 1126, 1135-36 (9th Cir. 2009) ("Congress clearly intended to preempt common-law tort claims, such as general tort theories of liability[,]" including "classic negligence" claims); *Gilland v. Sportsmen's Outpost, Inc*., 2011 Conn. Super. LEXIS 1320, *42 (Conn. Super. May 26, 2011) ("[I]t is clear that… a [barred] 'qualified civil liability action'…includes cases where it is alleged that gun sellers negligently cause harm.").[5]

Most important, Plaintiffs have cited to no case – decided under Connecticut law or the law of any other jurisdiction – in which a product manufacturer negligently entrusted a lawful product by legally selling it to a wholesale distributor, which in turn sold the product to a retail dealer, which then sold it to a person who used it to cause harm. For good reason: to negligently entrust chattel, the supplier must know or be given a reason to know that the person to whom the chattel is entrusted is not competent to use it safely. A manufacturer that is once, twice or three times removed from interaction with the person ultimately entrusted to use the chattel cannot possibly assess the person's competency. *See Phillips*, 84 F. Supp. 3d at 1225-26 (D. Colo. 2015) (dismissing negligent entrustment claims in case arising from Aurora Colorado theatre shooting

[5] *See also Delana v. CED Sales, Inc.*, 2016 Mo. LEXIS 76, * 7 (Mo. S. Ct. Apr. 5, 2016) ("The PLCAA preempts common law state tort actions that do not fall within a statutory exception."); *Estate of Kim v. Coxe*, 295 P.3d 380, 385 (Ak. 2013) (A plain reading of the PLCAA "supports a prohibition on general negligence actions – including negligence with concurrent causation"); *Jeffries*, 916 F. Supp. 2d 46, 48 (D.D.C. 2013) (PLCAA "unequivocally" bars plaintiff's negligence claim); *Phillips v. Lucky Gunner, LLC*, 84 F. Supp. 3d 1216, 1226 (D. Colo. 2015) (recognizing PLCAA prohibition on general negligence claims).

under the PLCAA definition: "the standard for negligent entrustment liability is narrower than the ordinary negligence standard because the manner in which the chattel is ultimately used is outside the supplier's control").[6]

### 3. Remington's compliance with the laws and regulations governing its licensed manufacturing activities provides it with PLCAA immunity.

Plaintiffs incorrectly argue that Remington's lawful manufacture and sale of the firearm involved in the shooting is a "red herring" because a legally sold firearm can still be sold negligently. (Obj. at 35.) There may be circumstances in which a firearm should not be entrusted by a seller to a specific person who is a legally-qualified buyer of the firearm. A legally-qualified buyer can provide actual or constructive notice to the retail seller of the buyer's intention to use the firearm to cause harm to himself or others. Under this scenario, the "entrustment" of the firearm by the seller would be "negligent" although the transfer would not have violated any laws or regulations. *See* 15 U.S.C. § 7903(5)(B). The manufacturer is absent from this scenario.

The PLCAA limits the availability of such a "lawful but still actionable" negligent entrustment claim to actions against statutorily-defined firearm "sellers." 15 U.S.C. § 7903(5)(A)(ii). In contrast, permissible actions against "manufacturers," require an allegation that a state or federal statute applicable to the sale or marketing of firearms was violated. *See* 15 U.S.C. § 7903(5)(A)(iii). Indeed, firearm manufacturer compliance with the laws and regulations governing federally-licensed manufacturing activities is the foundation on which manufacturer immunity from suit under the PLCAA is based. Lawsuits against firearm manufacturers who comply with the myriad laws and regulations governing their business activities "may not be brought" when the claim results from the criminal misuse of a firearm. 15 U.S.C. § 7902(a). Under

[6] Plaintiffs' continued reliance on *Smith v. United States*, 508 U.S. 223 (1993) for a broad interpretation of what constitutes a "use" of a firearm is in disregard of the subsequent Supreme Court decision in *Bailey v. United States*, 516 U.S. 137 (1995). *See United States v. Regans*, 125 F.3d 685, 686 n.2 (8th Cir. 1997) (recognizing that *Bailey* overruled *Smith*'s expansive interpretation of a firearm "use" under 18 U.S.C. § 924(c)(1)).

the PLCAA, there is no place for the argument that a lawful act by a manufacturer can nevertheless be actionable negligent entrustment.

An inquiry by a court or jury into the "reasonableness" a firearm manufacturer's compliance with laws governing its business activities not only falls outside PLCAA exceptions to immunity. It would be an impermissible inquiry into the "reasonableness" of the laws themselves, raising serious separation-of-powers concerns under both the United States and Connecticut constitutions. *See, e.g., Kelley Property Dev., Inc. v. Lebanon*, 226 Conn. 314, 339-40 (1993); *State v. Deciccio*, 315 Conn. 79, 144 (2014) (recognizing that the legislature is far better equipped to make sensitive policy judgments concerning the dangers of firearms). Permitting such an inquiry would also turn the PLCAA into a meaningless congressional act, affording law-abiding firearm manufacturers with no protections at all against being sued when criminals cause harm.

Finally, Plaintiffs' reliance on the *dissenting* opinion in *McCarthy v. Olin Corp*., 119 F.3d 148 (2d Cir. 1997), reveals that they fundamentally seek to nullify the PLCAA and override congressional intent to protect firearm manufacturers from litigation when criminals misuse lawfully manufactured firearms. (Obj. at 35.) Plaintiffs omitted from their citation to *McCarthy* that the *dissenting* judge, in arguing that society would benefit if ammunition manufacturers were required to "internalize the costs" associated with legal ammunition sales, cited to a law review "note" titled—*Absolute Liability for Ammunition Manufacturers*. 119 F.3d at 169 n.22. No one would seriously dispute that creation of an absolute liability scheme on an industry that produces constitutionally-protected products is within the purview of the legislature, not the courts. Nor can it be seriously disputed that a claim against a firearm manufacturer for damages caused by the criminal misuse of a firearm, based only on the firearm's lawful manufacture and placement into the stream of commerce, is an absolute liability claim without basis in Connecticut law or the law

in any other jurisdiction. It is also plainly prohibited by the PLCAA.

**B. Plaintiffs' CUTPA action against Remington is legally insufficient.**

Plaintiffs CUTPA allegations against Remington are legally insufficient for several reasons. Plaintiffs do not have standing to assert CUTPA claims. Moreover, their CUTPA claims were not timely filed, are in fact thinly veiled product liability claims, and are subject to the CUTPA regulatory exception. In any event, CUTPA cannot serve as a predicate statute under the PLCAA exception to immunity for violation of statutes applicable to the sale or marketing of firearms.

**1. Plaintiffs concede they do not have standing to assert a CUTPA action.**

Plaintiffs acknowledge that the Connecticut Supreme Court cases addressing who may seek redress for financial losses under CUTPA "support" Remington's position that Plaintiffs lack standing to maintain their claim: "[W]e acknowledge that these cases and others cited … support defendants' construction of CUTPA …." (Obj. at 50-51.) Plaintiffs argue, however, that the Connecticut Supreme Court's decision in *Ganim v. Smith & Wesson, Corp.*, 258 Conn. 313 (2001) was an "indication" that they have standing to pursue their claim. (Obj. at 50.) But *Ganim* did not signal that the reach of CUTPA expands beyond consumers and others in commercial relationships with the defendant. The court in *Ganim* did not need reach that question. 258 Conn. at 372. Instead, it affirmed dismissal on a broader ground that applied to "all of the plaintiffs' substantive claims as alleged in the various counts of the complaint." *Id*. at 365. Plaintiffs were held to lack standing with respect to all of their claims because their harm was too remote from the defendants' conduct and was derivative of the injuries to others. *Id*.

In *Vacco v. Microsoft Corp*., 260 Conn. 59 (2002), the Connecticut Supreme Court had the opportunity to expand CUTPA's reach to an indirect purchaser who had been harmed by the defendant's conduct. But it refused to do so, and instead affirmed the principle that Plaintiffs resist:

CUTPA "is not so formless as to provide redress to any person, for any ascertainable harm, caused by any person in the conduct of trade or commerce." *Id*. at 87.

In *Ventres v. Goodspeed Airport, LLC*, 275 Conn. 105 (2005), the court again had the opportunity to expand the reach of CUTPA to those outside of consumer or business relationships with a defendant, but did not. Instead, the court in *Ventres*, expressly rejected the argument that "a CUTPA plaintiff is not required to allege any business relationship with the defendant." *Id*. at 157.

Most recently, the appellate court in *Pinette v. McLaughlin*, 96 Conn. App. 769 (2006), refused to expand the reach of CUTPA to a third party beneficiary to a lease, holding that "a plaintiff must have at least *some* business relationship with the defendant in order to state a cause of action under CUTPA." *Id*. at 777. Each of these post-*Ganim* decisions are binding on this Court, and require that Plaintiffs' CUTPA claim be stricken.[7]

It is frivolous for Plaintiffs to argue that they have standing to assert a CUTPA claim based on *Ganim*, when the court has not expanded CUTPA's reach despite having multiple subsequent opportunities to do so. Regardless, the language in *Ganim* that Plaintiffs believe serves as an "indication" that they have standing to assert a CUTPA claim should be considered in context. In discussing the remoteness doctrine, the court identified "directly injured parties" who, unlike the

[7] Plaintiffs' argument that the Court cannot strike their CUTPA allegations because they are made in the same counts as their negligent entrustment allegations should be rejected. In *Coe v. Board of Education*, 301 Conn. 112 (2011), the Connecticut Supreme Court affirmed a trial court order striking allegations supporting a legally insufficient claim, despite the fact that the count contained sufficient allegations supporting a separate claim. *Id*. at 120-21. In doing so, the court cited approvingly to two superior court opinions, one of which reasoned that "[p]rior case law ought not to be read for the proposition that clearly improper allegations upon which relief may not be granted as a matter of law must remain in a compliant indefinitely, leading to confusion for the court, the parties and the jury, just because there are aspects of the complaint that are otherwise valid. If the motion to strike has merit as to certain allegations of the complaint … the proper course is to strike those allegations only…." *Id*. at 121 n. 5 (*citing Cook v. Stender*, 2004 Conn. Super LEXIS 3799, *3-4 (Conn. Super. Dec. 22, 2004); *see also Nordling v. Harris*, 1996 Conn. Super. LEXIS 2063, *2 n.1 (Conn. Super. Aug. 7, 1996) ("Under prior case law and earlier versions of the Practice Book, it was generally improper to demur to a paragraph of a complaint unless the paragraph purported to state a separate cause of action … Since 1978, however, the Practice Book has not contained such a restraint.")). In any event, the entirety of the allegations in each count of the First Amended Complaint directed to Remington are legally insufficient and should be stricken. Thus, the court is not required to strike just portions of those counts.

City of Bridgeport, "exist at a level less removed" from the defendants' alleged conduct, and did not present the problem of determining whether their harm was caused by defendants' wrongdoing or independent factors, or how damages should be apportioned. 258 Conn. at 359-60. The court's discussion was in the context of the City of Bridgeport's standing generally, across each of the nine counts in the City's complaint, including counts pleading negligence, product liability, public nuisance, unjust enrichment and CUTPA violations. The court in *Ganim* did not single out persons directly injured by firearms as a category of persons who might have standing to assert a CUTPA action. Although the court did not need to reach the question of whether CUTPA standing is limited to consumers, competitors and those in commercial relationships with the defendant, the court did affirm the principle that it has continued to affirm to this day: CUTPA standing ***does not*** extend to any person who has suffered any "ascertainable loss of money or property." 258 Conn. at 373.[8]

**2. Courts lack subject matter jurisdiction over CUTPA claims that are not filed within three years of an alleged CUTPA violation.**

Where a specific time limitation is contained in a statute that creates a right of action that did not exist at common law, the remedy exists only during the prescribed time period and not thereafter. *Stec v. Raymark Industries, Inc*., 299 Conn. 346, 365 (2010). Such a statutory time

[8] Plaintiffs' analysis of whether they have adequately alleged the type of financial damages recoverable under CUTPA is also flawed. (Obj. at 51-52.) Plaintiffs' reliance on *Stearns & Wheeler, LLC v. Kowalsky Bros., Inc.*, 289 Conn. 1 (2008), is inapt. There, the Supreme Court reiterated that it is "well established that in order to prevail on a CUTPA claim, the plaintiff," an environmental engineering firm who had alleged a "commercial relationship" with the defendant, must show it suffered "'ascertainable loss of money or property'"; in this case, that loss was the "sum [plaintiff had] paid to the estates pursuant to the settlement of the estates' wrongful death action" brought against the plaintiff. *Id*. at 5, 10. But *Stearns* does not at all say that the underlying wrongful death claims brought by the estate plaintiffs against the environmental firm plaintiff included recoverable CUTPA damages in that separate lawsuit. Plaintiffs' reliance on *Builes v. Kashinevsky*, 2009 Conn. Super. LEXIS 2527 (Conn. Super. Sept. 15, 2009), is also inapt. There, this Court held that "altering medical records to avoid negligence claims is a proper claim under CUTPA," but struck the plaintiff's CUTPA claim because she had alleged "emotional distress as her only damages relating to the alteration of the medical records. *Any other injuries alleged relate to the actual medical treatment*, and not to the alleged alteration of the records, which is the basis for the CUTPA claim." *Id*. at *11, *17 (emphasis added). These cases simply do not support Plaintiffs' position that funeral and medical expenses constitute recoverable CUTPA damages, especially without the requisite consumer or business relationship with Remington.

limitation is not an ordinary statute of limitation but is a limitation on liability itself. *Id*. The time limitation is a substantive and jurisdictional prerequisite. *Id*. The CUTPA statute of limitations found in Section 42-110g(f) is such a statute and if it is not met, a court does not have jurisdiction over the action. *See Blinkoff v. O & G Industries, Inc.,* 113 Conn. App. 1, 8-9, *cert denied*, 291 Conn. 913, 969 (2009).[9]

Plaintiffs incorrectly read *Pellecchia v. Conn. Light & Power Co*., 52 Conn. Super. 435 (2011) as holding that the wrongful death statute of limitations found in Section 52-555 overrides the CUTPA statute of limitations. (Obj. at 52-53.) That is not the holding. In *Pellecchia*, the plaintiff filed a wrongful death action more than two years after the decedent's death and thus did not meet the two-year wrongful death limitation period. To save his case, the plaintiff attempted to avail himself of the "accidental failure of suit statute" found in Section 52-592. The court held that Section 52-592 was inapplicable and plaintiff's negligence, recklessness and CUTPA claims were barred by Section 52-555 because Section 52-555 is substantive and jurisdictional in nature and overrides "statutes of limitations for torts or negligence generally." *Id*. at 445.

Thus, the court in *Pellecchia* merely held that, based on the circumstances of the case, the two-year wrongful death limitation period needed to be satisfied for all of plaintiff's multiple claims. Because all the claims were filed more than two years after death, the court lacked subject matter jurisdiction. However, there was no issue in *Pellecchia* as to whether the CUTPA limitation period, with its own jurisdictional statute of limitations, also had to be met because the plaintiff's action was filed within the three-year CUTPA limitation period—*i.e.*, it had been satisfied. 52 Conn. Super. at 446. Thus, contrary to plaintiff's reading of *Pellecchia*, the court did not hold that

[9] The Supreme Court has clarified that 42-110g(f), although sometimes called a "statute of limitations," is "technically" more a statute of repose. *Barrett v. Montesano*, 269 Conn. 787, 794-95, 849 A.2d 839, 845 (2004).

a CUTPA claim seeking damages for wrongful death is governed only by the limitation period in Section 52-555. (Obj. at 52.) Bringing a wrongful death lawsuit under CUTPA does not eliminate the need to satisfy all of CUTPA's jurisdictional requirements, including the limitations period. *See, e.g.*, *Wilson v. Midway*, 198 F. Supp. 2d 167, 174 (Dist. Conn. 2002) (dismissing CUTPA claim as time-barred in wrongful death action).[10]

Under Plaintiffs' interpretation of the law, the CUTPA 3-year limitation period, although jurisdictional in nature, should be ignored in favor of the wrongful death limitation period. *But see Greco v. United Techs. Corp*., 277 Conn. 337, 350 (2005) (Plaintiffs "shoulder a heavy burden of establishing" that a jurisdictional statute of limitations is preempted by another statute of limitations). Doing so, however, would violate the well-established rule that when two statutes appear to be in conflict, but can be construed consistently with one another, the courts should give effect to both statutes. *Spears v. Garcia*, 263 Conn. 22, 32 (2003). This rule is based on "the principle that the legislature is always presumed to have created a harmonious and consistent body of law." *Nizzardo v. State Traffic Comm.*, 259 Conn. 131, 157 (2002).

The only way to reconcile the application of two jurisdictional statutes of limitation is to require that both be satisfied. Thus, to the extent a CUTPA action survives death, it must be brought within three years of the conduct complained of, and within two years of death. Only then will jurisdiction be conferred on the court. The decision in *Greco*, 277 Conn. 337 (2005) does not compel a different conclusion. There, the plaintiffs failed to file their wrongful death actions within two years of death as required by Section 52-555, and tried to avail themselves of the longer

[10] The *Pellecchia* appellate court did not, as Plaintiffs contend, affirm a ruling the trial court did not make—namely, that wrongful death actions "made under CUTPA" are subject only to the jurisdictional prerequisite of the wrongful death statute. (Obj. at 53.) Rather, the appellate court in *Pellecchia*, 139 Conn. App. 88, 90 (2012) affirmed the trial court's ruling that the plaintiff's claims were not brought within the two-year wrongful death statute of limitations and were "not saved by the accidental failure of suit statute[.]"

limitation period found in Section 52-577c for personal injury damages caused by exposure to hazardous chemicals. The court rejected the plaintiffs' attempt based on the jurisdictional nature of the wrongful death limitation period. *Id*. at 349. Because Section 52-577c was not jurisdictional in nature, the order granting defendant's motion to strike was affirmed. *Id*. at 363. *Greco* simply stands for the proposition that statutes of limitation that are jurisdictional prerequisites cannot be waived and must be satisfied.[11] Here, the CUTPA claims against Remington are time-barred.

**3. Plaintiffs' CUTPA claims are considered a type of product defect claim under the CPLA and are therefore barred by the exclusivity provision of the CPLA and the PLCAA.**

Plaintiffs seek to distance their allegations regarding the design characteristics of the firearm (*i.e*., muzzle velocity, magazine capacity, rapid fire capability) and Remington's marketing of the firearm away from a product liability claim under the CPLA, because product liability claims are barred under the PLCAA when discharge of the firearm was a "volitional act that constituted a criminal offense." 15 U.S.C. § 7903(5)(A)(v). Plaintiffs have not disputed that if their design and marketing allegations are considered a product liability claim, the PLCAA bars the claims.

"Product liability claims" under the CPLA are not limited to claims for damages resulting from a product that does not function properly. Although defectively designed or manufactured products can be the basis of a "product liability claim," the CPLA also applies to claims involving products that functioned as they were designed to function. For example, a "product liability claim" can be based on the failure to provide an adequate warning regarding a product's dangers.

[11] Adopting Plaintiffs' approach, wherein the jurisdictional nature of the CUTPA limitations period is ignored, would result in the untenable situation in which a defendant could be sued in a wrongful death action within two years of the death based on conduct the defendant allegedly committed 50 years ago. The legislature, in providing a CUTPA cause of action and prescribing the time period in which such an action was to be commenced, surely did not intend such an anomalous situation. *See Doe v. Shimkus*, 2004 Conn. Super. LEXIS 750 (Conn. Super. Mar. 18, 2004) (No indication that legislature intended limitation on child sexual abuse claims in § 52-577d override limitation on claims against decedents in § 45a-375). There is no basis in the language of the wrongful death statute of limitation or its legislative history that suggests it was to override other jurisdictional limitation periods.

Gen. Stat. § 52-572m(b). A "product liability claim" can also be based on misrepresentations about the product's characteristics. *Id*. In both instances, the product may be "defective" under Connecticut product lability law even if it functioned as designed. *See Vitanza v. Upjohn*, 257 Conn. 365, 373-75 (2001) (Absence of warnings and directions may render a product "unreasonably" dangerous even if the product has no manufacturing or design defects).

Plaintiffs misconstrue product liability law in arguing that all claims for damages resulting from the use of a product "hinge" on an allegation that a product failed to function as it was intended to function. (Obj. at 46.) The deceptively marketed cigarettes at issue in *Gerrity v. R.J. Reynolds Tobacco Co*., 263 Conn. 120 (2003) are an example of a product that functioned as designed and manufactured, but a claim for personal injuries based on their dangers were held to be within the scope of the CPLA. Here, Plaintiffs complain about the manner in which the firearm involved in the shooting was marketed by Remington, and they allege the firearm was sold by Remington even though its design characteristics posed "unreasonable" risk of injury. (*See, e.g*., FAC at Count One, ¶ 213). Plaintiffs also allege that the "utility" of the rifle was outweighed by the "risk" of unlawful use. (*Id*. at ¶ 217.) These are plainly defect allegations under the CPLA.

Plaintiffs also attempt to distance themselves from the CPLA exclusivity provision by asserting that their "claims are founded on negligent entrustment, not product liability." (Obj. at 45.) But "all claims" that seek damages on account of a product are "product liability claims" under the CLPA, regardless of the legal theory on which they are based. Gen. Stat. § 52-572m(b). And Plaintiffs' reliance on *Short v. Ross*, 2013 Conn. Super LEXIS 422 (Conn. Super. Feb. 26, 2013) is misplaced. There, the plaintiff's negligent entrustment count focused only on the incompetence of a driver to use a rented truck in an unsafe environment. *Id.* at *24. The plaintiff's negligent entrustment count did not allege that the truck was in an unreasonably dangerous

condition or that the defendant had improperly warned the driver regarding the truck's use. Here, Plaintiffs' negligent entrustment allegations are based on Remington's marketing of the firearm, the firearm's design characteristics, and whether those characteristics created "unreasonable risks" of harm. (Obj. at 38.) Unlike the plaintiff in *Short*, Plaintiffs do not simply allege that a product was entrusted to a person who was incompetent to use it. They allege that risks posed by the design characteristics of the product and Remington's marketing materials made it unsafe to entrust to any civilian buyers. This is a product liability allegation.[12]

**4. CUTPA does not qualify as a predicate statute under the plain meaning of the PLCAA text and guiding precedent.**

Plaintiffs' reliance on *City of New York v. Beretta*, 524 F.3d 384 (2d Cir. 2008) is perplexing. Plaintiffs argue that the case "ought to be very significant in the Court's analysis" (Obj. at 40); yet, in the same breath, Plaintiffs ask the Court to disregard the Second Circuit's "textual definition" of "applicable" and adopt instead a definition of the term to mean "capable of being applied", which the Second Circuit plainly rejected, (*id*. at 41 n. 21, 44). *See City of New York*, 524 F.3d at 401-02 (Such an interpretation would be an "absurdity" because it "would allow the predicate exception to swallow the statute."). Plaintiffs further muddle their reliance on *City of New York* by asking the Court to adopt as "persuasive" the interpretation given to "applicable" by the *dissenting* judge and the district court judge who was *reversed*. (Obj. at 44.)

Plaintiffs' bold pronouncement, without citation, that the Second Circuit in *City of New York* – "held that statutes such as CUTPA are appropriate predicate" statutes is equally perplexing. (Obj. at 39) (emphasis added.) Plaintiffs have not simply overstated the holding in *City of New York*, they have stated it incorrectly. The Second Circuit's holding in *City of New York* was that

[12] Plaintiff in *Short* alleged in a separate negligence count that the truck had been improperly maintained and that the defendant had failed to warn the driver. These allegations were held be within the scope of the CPLA and were stricken. *Short*, 2013 Conn. Super LEXIS, at *41.

the predicate exception to PLCAA immunity did not encompass a New York statute, which, much like CUTPA, was a statute of general application. 524 F.3d at 404.

Like the plaintiff in *City of New York*, Plaintiffs here read the predicate exception much too broadly. *City of New York*, 524 F.3d at 402 ("capable of being applied" is "a far too broad reading of the predicate exception."). The Second Circuit had little difficulty holding that a New York statute, virtually identical in breadth of application to CUTPA, was not the type of statute Congress intended to serve as a predicate statute because it neither "expressly regulat[ed]" nor could "clearly … be said to implicate the purchase and sale of firearms." 524 F.3d at 404. There is simply no plausible way to read *City of New York* and conclude that the Second Circuit would accept CUTPA as a predicate statute when it has rejected the New York statute – both of which are remedial statutes of general application.

Plaintiffs also incorrectly attempt to distinguish *City of New York* by arguing that the Second Circuit held that the New York statute was not "applicable to the sale or marketing" of firearms because "New York's high courts had already indicated disapproval of such a claim." (Obj. at 42 n. 22.) Plaintiffs cite to *Hamilton v. Beretta U.S.A. Corp.*, 96 N.Y.2d 222 (N.Y. 2001), but there the court simply rejected imposition of a common law duty on the part of firearm manufacturers and distributors to exercise ordinary care in marketing and distributing handguns. The plaintiffs in *Hamilton* did not plead a statutory nuisance action and the court did not address the state nuisance statute. Similarly, in *People v. Sturm, Ruger & Co.*, 761 N.Y.S.2d 192 (N.Y. App. 2003), the plaintiffs did not plead a statutory nuisance claim, and the court did not consider application of the state nuisance statute to the defendants' alleged business activities. Rather, the court affirmed dismissal of a *common law* public nuisance action. *Id.* Thus, there was no "context of prior decisions" by New York state courts addressing the viability of a cause of action against

firearm manufacturers and sellers under the state nuisance statute, as Plaintiffs claim. (Obj. at 42, n. 22.) The Second Circuit rejected the New York statute as a predicate exception because it neither expressly regulated nor clearly implicated the sale or marketing of firearms. 524 F.3d at 403-04.

Plaintiffs' expansive interpretation of the predicate exception is not only contrary to the holding in *City of New York*, but it yields an "absurd" or unworkable result because it allows the exception to swallow the rule. 524 F.3d at 401. Thus, the Court can consider "extratextual evidence," such as legislative history to ascertain meaning. Gen. Stat. § 1-2z. The legislative history regarding the types of statutes that Congress had in mind as predicate statutes is not contradictory, but consistent and unanimous. It was "the unanimously expressed understanding" of legislators that predicate statutes were to be only those "concerning firearm regulations or sales and marketing regulations." *Ileto*, 565 F.3d at 1137; *City of New York*, 524 F.3d at 402-03 ("[T]he predicate exception was meant to apply only to statutes that actually regulate the firearms industry" given the consistent statements made by legislators).

The Connecticut Supreme Court has repeatedly held that the Federal Trade Commission Act (FTC Act) serves as "the lodestar for interpretation of the open-ended language of CUTPA." *See, e.g., Russell v. Dean Witter Reynolds, Inc.* 200 Conn. 172, 179, 510 A.2d 972 (1986) (listing cases); *see also* Gen. Stat. § 42-110b(b) ("[T]he courts of this state shall be guided by interpretations given by the Federal Trade Commission and the federal courts to Section 5(a)(1) of the Federal Trade Commission Act."). In *Russell*, the court held that CUTPA does not apply to deceptive practices in the purchase and sale of securities, reasoning that:

> Despite the breadth of the language of § 5(a)(1) of the FTC Act, which, read literally, would include security transactions, the plaintiff has cited no case in which the FTC or a federal court has applied the FTC Act to a securities transaction and we have found none. Indeed, an agency statement listing the types of transactions and conduct to which the FTC Act applies, the FTC makes no mention of securities. 3 Trade Reg. Reptr. (CCH) para. 9551, pp. 17,021-22. Consequently, in this case,

> taking our guidance from the FTC, we must construe CUTPA as not purporting to cover transactions for the purchase and sale of securities.

*Id.* at 180. Similarly, the FTC has never undertaken to adjudicate allegedly deceptive manufacture or marketing of firearms, and Plaintiffs have cited to no case in which the FTC Act has been applied to such conduct involving firearms. Moreover, the "agency statement listing the type of transactions and conduct to which the FTC Act applies" makes no mention of firearms. *See* 3 Trade Reg. Reptr. (CCH) para. 9551, pp. 17,021-22, attached as Exhibit B. The FTC has likely not acted with respect to firearms manufacturing or marketing for the same reason it has not acted with respect to securities: the Bureau of Alcohol, Tobacco, Firearms & Explosives ("ATF") has broad regulatory authority over federal firearms licensees and their business activities.

Plaintiffs incorrectly cite *Salomonson v. Billistics, Inc.*, 1991 Conn. Super. LEXIS 2231 (Conn. Super. Sept. 27, 1991), for the proposition that CUTPA "has been applied to the sale and marketing of firearms." (Obj. at 43.) *Salomonson*, however, was simply a case involving disappointed commercial expectations of the plaintiff, a firearms collector, who entered into a contract with the defendant to have certain remanufacturing work performed on his firearms. 1991 Conn. Super. LEXIS 2231, at *25. The defendant was also to prepare and submit applications to the federal government for approval to do the work and transfer the firearms back to the plaintiff when the work was completed. *Id*. Despite his promises, the defendant failed to deliver timely the completed firearms to the plaintiff, and he made allegedly deceptive statements regarding the status of government approval. *Id*. The court found that the defendant's failure to deal in good faith with the plaintiff was oppressive and violated CUTPA. *Id*. at *37.

*Salomonson* merely stands for the proposition that CUTPA applies to commercial transactions involving goods in which a consumer suffers an ascertainable loss of money or property resulting from a defendant's deceptive marketplace conduct. That firearms were the

goods at issue was irrelevant to the court's decision. *Salomonson* does not stand for the broader proposition that CUTPA, in and of itself, has applied to or "clearly can be said to implicate" the "sale or marketing" of firearms in the context of the PLCAA. *See City of New York*, 524 F.3d at 403-04. If anything, *Salomonson* simply underscores the necessity of a commercial relationship between the parties resulting in a financial injury as prerequisites to potential CUTPA liability.

**5. Remington's transfer of the firearm was permitted under the law and the regulations administered by ATF.**

Plaintiffs contend that Remington's argument that CUTPA's regulatory preemption exception is "premature" because they have not alleged "the extent to which the actions at issue are regulated." (Obj. at 54.) But the extent to which firearm manufacturers and sellers are regulated is a legal matter, not a factual matter. In any event, this Court can take judicial notice that each of the transactions involving the firearm used in the shooting was "permitted under law administered" by the ATF and the Connecticut Department of Public Safety ("DPS"). Gen. Stat. § 42-110c(a); *See AFB Constr. Mgmt. of Trumbull v. Herbst*, 2013 Conn. Super. LEXIS 2915, *15 n. 2 (Conn. Super. Dec. 17, 2013) (It is appropriate for the court on a motion to strike to take judicial notice of governmental regulations under Gen. Stat. § 52-163); *Jacobs v. Crown*, 7 Conn. App. 296 (1986) (It is proper to take judicial notice of federal regulation provide it is called to court's attention and authoritative source provided). Indeed, Plaintiffs have conceded that the transactions were "legal" and "lawful," meaning that the transactions did not violate any of the laws and regulations administered by the federal and state agencies. (Obj. at 35.)

The purpose of Section 42-110c(a) is "to ensure that a business is not subjected to unfair trade practice liability if it relies on activity permitted by law." *State v. Tomasso*, 2005 Conn. Super. LEXIS 888, *16 (Conn. Super. Apr. 8, 2005) (citing *Rini v. United Van Lines, Inc*., 903 F.Supp. 224, 231 (D.Mass. 1995)). Here, each Defendant was required to be licensed by the ATF

to conduct its business activities. *See* 18 U.S.C. § 923; 27 CFR § 478.41 (Licenses – General). The transactions between Remington and Camfour and between Camfour and Riverview Sales were subject to ATF regulations, which affirmatively permitted the transfer of the firearm between the federal firearm licensees. *See* 18 U.S.C. § 923(g)(1)(a) (records regarding acquisition and disposition of firearms); 27 CFR § 478.94 (Sales or deliveries between licensees); 27 CFR § 478.121 (Records – General); 27 CFR § 478.123 (Records maintained by manufacturers). The transfer of the firearm by Riverview Sales to Nancy Lanza was also subject to ATF regulations, and to regulations administered by DPS. And, as Plaintiffs concede, the sale was "lawful" and therefore specifically permitted by DPS. Gen. Stats. § 29-36i (Verification by DPS of eligibility or persons to receive or possess firearms); 27 CFR § 478.102 (Sales or deliveries – background check); 28 CFR 25.6(b) (FBI NICS Operation Center).

Plaintiffs are incorrect that a Section 42-110c(a) defense can only be raised on a motion for summary judgment. *See Tomasso*, 2005 Conn. Super. LEXIS 888, at *8 (whether an a case comes within Section 42-110c(a) goes to the legal sufficiency of the allegations of the complaint to state a claim upon which relief can be granted); *JP Morgan Chase Bank Nat'l Ass'n v. O'Neil*, 2011 Conn. Super. LEXIS 699 (Conn. Super. Mar. 24, 2011) (addressing application of § 42-110c on motion to strike). Here, Plaintiffs have conceded that the transactions involving the firearm were "legal" and "lawful." (Obj. at 35.) There are no other "facts" to assume in order to determine what the firearms laws and regulations administered by ATF and DPS permit, and to conclude that the specific transactions in this case were permitted under those laws and regulations. Section 42-110c(a) protects Remington from Plaintiffs' CUTPA claim and requires it be stricken.

## CONCLUSION

Remington respectfully requests that the Court grant its Motion to Strike.

THE DEFENDANTS,

REMINGTON ARMS CO., LLC and
REMINGTON OUTDOOR COMPANY, INC.

BY:/s/ Scott M. Harrington/#307196

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**CERTIFICATE OF SERVICE**

I hereby certify that a true copy of the foregoing was mailed on June 10, 2016 to the following counsel:

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# Exhibit A

- 27 CFR § 478.41
- 27 CFR § 478.94
- 27 CFR. § 478.50
- 27 CFR § 478.102
- 27 CFR § 478.121
- 27 CFR § 478.123
- 28 CFR § 25.6(b)

# 27 CFR 478.41

This document is current through the June 6, 2016 issue of the Federal Register with the exception of the amendment appearing at 81 FR 35644, June 3, 2016



## § 478.41 General.

**(a)** Each person intending to engage in business as an importer or manufacturer of firearms or ammunition, or a dealer in firearms shall, before commencing such business, obtain the license required by this subpart for the business to be operated. Each person who desires to obtain a license as a collector of curios or relics may obtain such a license under the provisions of this subpart.

**(b)** Each person intending to engage in business as a firearms or ammunition importer or manufacturer, or dealer in firearms shall file an application, with the required fee (see § 478.42), with ATF in accordance with the instructions on the form (see § 478.44), and, pursuant to § 478.47, receive the license required for such business from the Chief, Federal Firearms Licensing Center. Except as provided in § 478.50, a license must be obtained for each business and each place at which the applicant is to do business. A license as an importer or manufacturer of firearms or ammunition, or a dealer in firearms shall, subject to the provisions of the Act and other applicable provisions of law, entitle the licensee to transport, ship, and receive firearms and ammunition covered by such license in interstate or foreign commerce and to engage in the business specified by the license, at the location described on the license, and for the period stated on the license. However, it shall not be necessary for a licensed importer or a licensed manufacturer to also obtain a dealer's license in order to engage in business on the licensed premises as a dealer in the same type of firearms authorized by the license to be imported or manufactured. Payment of the license fee as an importer or manufacturer of destructive devices, ammunition for destructive devices or armor piercing ammunition or as a dealer in destructive devices includes the privilege of importing or manufacturing firearms other than destructive devices and ammunition for other than destructive devices or ammunition other than armor piercing ammunition, or dealing in firearms other than destructive devices, as the case may be, by such a licensee at the licensed premises.

**(c)** Each person seeking the privileges of a collector licensed under this part shall file an application, with the required fee (see § 478.42), with ATF in accordance with the instructions on the form (see § 478.44), and pursuant to § 478.47, receive from the Chief, Federal Firearms Licensing Center, the license covering the collection of curios and relics. A separate license may be obtained for each collection premises, and such license shall, subject to the provisions of the Act and other applicable provisions of law, entitle the licensee to transport, ship, receive, and acquire curios and relics in interstate or foreign commerce, and to make disposition of curios and relics in interstate or foreign commerce, to any other person licensed under the provisions of this part, for the period stated on the license.

**(d)** The collector license provided by this part shall apply only to transactions related to a collector's activity in acquiring, holding or disposing of curios and relics. A collector's license does not authorize the collector to engage in a business required to be licensed under the Act or this part. Therefore, if the acquisitions and dispositions of curios and relics by a collector bring the collector within the definition of a manufacturer, importer, or dealer under this part, he shall qualify as such. (See also § 478.93 of this part.)

## Statutory Authority

*(18 U.S.C. 847 (84 Stat. 959); 18 U.S.C. 926 (82 Stat. 1226))*

## History

[33 FR 18555, Dec. 14, 1968; redesignated at 40 FR 16835, Apr. 15, 1975, and amended by 53 FR 10494, Mar. 31, 1988; 54 FR 53054, Dec. 27, 1989; 64 FR 17291, Apr. 9, 1999; redesignated and amended at 68 FR 3744, 3750, Jan. 24, 2003; 73 FR 57239, 57240, Oct. 2, 2008]

# 27 CFR 478.50

This document is current through the June 6, 2016 issue of the Federal Register with the exception of the amendment appearing at 81 FR 35644, June 3, 2016



## § 478.50 Locations covered by license.

The license covers the class of business or the activity specified in the license at the address specified therein. A separate license must be obtained for each location at which a firearms or ammunition business or activity requiring a license under this part is conducted except:

**(a)** No license is required to cover a separate warehouse used by the licensee solely for storage of firearms or ammunition if the records required by this part are maintained at the licensed premises served by such warehouse;

**(b)** A licensed collector may acquire curios and relics at any location, and dispose of curios or relics to any licensee or to other persons who are residents of the State where the collector's license is held and the disposition is made;

**(c)** A licensee may conduct business at a gun show pursuant to the provision of § 478.100; or

**(d)** A licensed importer, manufacturer, or dealer may engage in the business of dealing in curio or relic firearms with another licensee at any location pursuant to the provisions of § 478.100.

## Statutory Authority

**AUTHORITY NOTE APPLICABLE TO ENTIRE PART:**

*5 U.S.C. 552*(a); *18 U.S.C. 921*-931; *44 U.S.C. 3504*(h).

## History

*[49 FR 46890,* Nov. 29, 1984; *63 FR 35520, 35523,* June 30, 1998; redesignated and amended at *68 FR 3744, 3750,* Jan. 24, 2003]

# 27 CFR 478.94

This document is current through the June 6, 2016 issue of the Federal Register with the exception of the amendment appearing at 81 FR 35644, June 3, 2016



## § 478.94 Sales or deliveries between licensees.

A licensed importer, licensed manufacturer, or licensed dealer selling or otherwise disposing of firearms, and a licensed collector selling or otherwise disposing of curios or relics, to another licensee shall verify the identity and licensed status of the transferee prior to making the transaction. Verification shall be established by the transferee furnishing to the transferor a certified copy of the transferee's license and by such other means as the transferor deems necessary: Provided, That it shall not be required (a) for a transferee who has furnished a certified copy of its license to a transferor to again furnish such certified copy to that transferor during the term of the transferee's current license, (b) for a licensee to furnish a certified copy of its license to another licensee if a firearm is being returned either directly or through another licensee to such licensee and (c) for licensees of multilicensed business organizations to furnish certified copies of their licenses to other licensed locations operated by such organization: Provided further, That a multilicensed business organization may furnish to a transferor, in lieu of a certified copy of each license, a list, certified to be true, correct and complete, containing the name, address, license number, and the date of license expiration of each licensed location operated by such organization, and the transferor may sell or otherwise dispose of firearms as provided by this section to any licensee appearing on such list without requiring a certified copy of a license therefrom. A transferor licensee who has the certified information required by this section may sell or dispose of firearms to a licensee for not more than 45 days following the expiration date of the transferee's license.

(Approved by the Office of Management and Budget under control number 1140-0032)

## Statutory Authority

**AUTHORITY NOTE APPLICABLE TO ENTIRE PART:**

*5 U.S.C. 552*(a); *18 U.S.C. 921*-931; *44 U.S.C. 3504*(h).

## History

*[53 FR 10496,* Mar. 31, 1988; redesignated at *68 FR 3744, 3750,* Jan. 24, 2003; *73 FR 57239, 57241,* Oct. 2, 2008]

# 27 CFR 478.102

This document is current through the June 6, 2016 issue of the Federal Register with the exception of the amendment appearing at 81 FR 35644, June 3, 2016



## § 478.102 Sales or deliveries of firearms on and after November 30, 1998.

**(a)** Background check. Except as provided in paragraph (d) of this section, a licensed importer, licensed manufacturer, or licensed dealer (the licensee) shall not sell, deliver, or transfer a firearm to any other person who is not licensed under this part unless the licensee meets the following requirements:

**(1)**Before the completion of the transfer, the licensee has contacted NICS;

**(2)**

**(i)**NICS informs the licensee that it has no information that receipt of the firearm by the transferee would be in violation of Federal or State law and provides the licensee with a unique identification number; or

**(ii)**Three business days (meaning days on which State offices are open) have elapsed from the date the licensee contacted NICS and NICS has not notified the licensee that receipt of the firearm by the transferee would be in violation of law; and

**(3)**The licensee verifies the identity of the transferee by examining the identification document presented in accordance with the provisions of § 478.124(c).

Example for paragraph (a). A licensee contacts NICS on Thursday, and gets a "delayed" response. The licensee does not get a further response from NICS. If State offices are not open on Saturday and Sunday, 3 business days would have elapsed on the following Tuesday. The licensee may transfer the firearm on the next day, Wednesday.

**(b)** Transaction number. In any transaction for which a licensee receives a transaction number from NICS (which shall include either a NICS transaction number or, in States where the State is recognized as a point of contact for NICS checks, a State transaction number), such number shall be recorded on a firearms transaction record, Form 4473, which shall be retained in the records of the licensee in accordance with the provisions of § 478.129. This applies regardless of whether the transaction is approved or denied by NICS, and regardless of whether the firearm is actually transferred.

**(c)** Time limitation on NICS checks. A NICS check conducted in accordance with paragraph (a) of this section may be relied upon by the licensee only for use in a single transaction, and for a period not to exceed 30 calendar days from the date that NICS was initially contacted. If the transaction is not completed within the 30-day period, the licensee shall initiate a new NICS check prior to completion of the transfer.

Example 1 for paragraph (c). A purchaser completes the Form 4473 on December 15, 1998, and a NICS check is initiated by the licensee on that date. The licensee is informed by NICS that the information available to the system does not indicate that receipt of the firearm by the transferee would be in violation of law, and a unique identification number is provided. However, the State imposes a 7-day waiting period on all firearms transactions, and the purchaser does not return to pick up the firearm until January 22, 1999. The licensee must conduct another NICS check before transferring the firearm to the purchaser.

Example 2 for paragraph (c). A purchaser completes the Form 4473 on January 25, 1999, and arranges for the purchase of a single firearm. A NICS check is initiated by the licensee on that date. The licensee is informed by NICS that the information available to the system does not indicate that receipt of the firearm by the transferee would be in violation of law, and a unique identification number is provided. The State imposes a 7-day waiting period on all firearms transactions, and the purchaser returns to pick up the firearm on February 15, 1999. Before the licensee executes the Form 4473, and the firearm is transferred, the purchaser decides to purchase an additional firearm. The transfer of these two firearms is considered a single transaction; accordingly, the licensee may add the second firearm to the Form 4473, and transfer that firearm without conducting another NICS check.

Example 3 for paragraph (c). A purchaser completes a Form 4473 on February 15, 1999. The licensee receives a unique identification number from NICS on that date, the Form 4473 is executed by the licensee, and the firearm is transferred. On February 20, 1999, the purchaser returns to the licensee's premises and wishes to purchase a second firearm. The purchase of the second firearm is a separate transaction; thus, a new NICS check must be initiated by the licensee.

**(d)** Exceptions to NICS check. The provisions of paragraph (a) of this section shall not apply if --

**(1)**The transferee has presented to the licensee a valid permit or license that --

**(i)**Allows the transferee to possess, acquire, or carry a firearm;

**(ii)**Was issued not more than 5 years earlier by the State in which the transfer is to take place; and

**(iii)**The law of the State provides that such a permit or license is to be issued only after an authorized government official has verified that the information available to such official does not indicate that possession of a firearm by the transferee would be in violation of Federal, State, or local law: Provided, That on and after November 30, 1998, the information available to such official includes the NICS;

**(2)**The firearm is subject to the provisions of the National Firearms Act and has been approved for transfer under 27 CFR Part 479; or

**(3)**On application of the licensee, in accordance with the provisions of § 478.150, the Director has certified that compliance with paragraph (a)(1) of this section is impracticable.

**(e)** The document referred to in paragraph (d)(1) of this section (or a copy thereof) shall be retained or the required information from the document shall be recorded on the firearms transaction record in accordance with the provisions of § 478.131.

(Approved by the Office of Management and Budget under control number 1140-0045)

## Statutory Authority

**AUTHORITY NOTE APPLICABLE TO ENTIRE PART:**

*5 U.S.C. 552*(a); *18 U.S.C. 921*-931; *44 U.S.C. 3504*(h).

## History

*[59 FR 7112,* Feb. 14, 1994; *60 FR 10786,* Feb. 27, 1995; *63 FR 58272, 58279,* Oct. 29, 1998; redesignated and amended at *68 FR 3744, 3750,* Jan. 24, 2003; *73 FR 57239, 57241,* Oct. 2, 2008]

# 27 CFR 478.121

This document is current through the June 6, 2016 issue of the Federal Register with the exception of the amendment appearing at 81 FR 35644, June 3, 2016



## § 478.121 General.

**(a)** The records pertaining to firearms transactions prescribed by this part shall be retained on the licensed premises in the manner prescribed by this subpart and for the length of time prescribed by § 478.129. The records pertaining to ammunition prescribed by this part shall be retained on the licensed premises in the manner prescribed by § 478.125.

**(b)** ATF officers may, for the purposes and under the conditions prescribed in § 478.23, enter the premises of any licensed importer, licensed manufacturer, licensed dealer, or licensed collector for the purpose of examining or inspecting any record or document required by or obtained under this part. Section 923(g) of the Act requires licensed importers, licensed manufacturers, licensed dealers, and licensed collectors to make such records available for such examination or inspection during business hours or, in the case of licensed collectors, hours of operation, as provided in § 478.23.

**(c)** Each licensed importer, licensed manufacturer, licensed dealer, and licensed collector shall maintain such records of importation, production, shipment, receipt, sale, or other disposition, whether temporary or permanent, of firearms and such records of the disposition of ammunition as the regulations contained in this part prescribe. Section 922(m) of the Act makes it unlawful for any licensed importer, licensed manufacturer, licensed dealer, or licensed collector knowingly to make any false entry in, to fail to make appropriate entry in, or to fail to properly maintain any such record.

**(d)** For recordkeeping requirements for sales by licensees at gun shows see § 478.100(c).

(Information collection requirements in paragraph (a) approved by the Office of Management and Budget under control number 1140-0020; information collection requirements in paragraphs (b) and (c) approved by the Office of Management and Budget under control number 1140-0032)

## Statutory Authority

**AUTHORITY NOTE APPLICABLE TO ENTIRE PART:**

*5 U.S.C. 552*(a); *18 U.S.C. 921*-931; *44 U.S.C. 3504*(h).

## History

*[33 FR 18555,* Dec. 14, 1968; redesignated at *40 FR 16835,* Apr. 15, 1975, and amended by *49 FR 46891,* Nov. 29, 1984; *50 FR 26703,* June 28, 1985; *53 FR 10501,* Mar. 31, 1988; redesignated and amended at *68 FR 3744, 3750,* Jan. 24, 2003; *73 FR 57239, 57241,* Oct. 2, 2008]

27 CFR 478.121

# 27 CFR 478.123

This document is current through the June 6, 2016 issue of the Federal Register with the exception of the amendment appearing at 81 FR 35644, June 3, 2016



## § 478.123 Records maintained by manufacturers.

**(a)** Each licensed manufacturer shall record the type, model, caliber or gauge, and serial number of each complete firearm manufactured or otherwise acquired, and the date such manufacture or other acquisition was made. The information required by this paragraph shall be recorded not later than the seventh day following the date such manufacture or other acquisition was made.

**(b)** A record of firearms disposed of by a manufacturer to another licensee and a separate record of armor piercing ammunition dispositions to governmental entities, for exportation, or for testing or experimentation authorized under the provision of § 478.149 shall be maintained by the licensed manufacturer on the licensed premises. For firearms, the record shall show the quantity, type, model, manufacturer, caliber, size or gauge, serial number of the firearms so transferred, the name and license number of the licensee to whom the firearms were transferred, and the date of the transaction. For armor piercing ammunition, the record shall show the manufacturer, caliber or gauge, quantity, the name and address of the transferee to whom the armor piercing ammunition was transferred, and the date of the transaction. The information required by this paragraph shall be entered in the proper record book not later than the seventh day following the date of the transaction, and such information shall be recorded under the format prescribed by § 478.122, except that the name of the manufacturer of a firearm or armor piercing ammunition need not be recorded if the firearm or armor piercing ammunition is of the manufacturer's own manufacture.

**(c)** Notwithstanding the provisions of paragraph (b) of this section, the Director of Industry Operations may authorize alternate records to be maintained by a licensed manufacturer to record the disposal of firearms and armor piercing ammunition when it is shown by the licensed manufacturer that such alternate records will accurately and readily disclose the information required by paragraph (b) of this section. A licensed manufacturer who proposes to use alternate records shall submit a letter application, in duplicate, to the Director of Industry Operations and shall describe the proposed alternate record and the need therefor. Such alternate records shall not be employed by the licensed manufacturer until approval in such regard is received from the Director of Industry Operations.

**(d)** Each licensed manufacturer shall maintain separate records of the sales or other dispositions made of firearms to nonlicensees. Such records shall be maintained in the form and manner as prescribed by §§ 478.124 and 478.125 in regard to firearms transaction records and records of acquisition and disposition of firearms.

(Approved by the Office of Management and Budget under control number 1140-0067)

## Statutory Authority

**AUTHORITY NOTE APPLICABLE TO ENTIRE PART:**

*5 U.S.C. 552*(a); *18 U.S.C. 921*-931; *44 U.S.C. 3504*(h).

## History

*[53 FR 10501,* Mar. 31, 1988; *64 FR 17291,* Apr. 9, 1999; redesignated and amended at *68 FR 3744, 3750,* Jan. 24, 2003; *73 FR 57239, 57241,* Oct. 2, 2008]

# 28 CFR 25.6

This document is current through the June 6, 2016 issue of the Federal Register with the exception of the amendment appearing at 81 FR 35644, June 3, 2016



## § 25.6 Accessing records in the system.

**(a)** FFLs may initiate a NICS background check only in connection with a proposed firearm transfer as required by the Brady Act. FFLs are strictly prohibited from initiating a NICS background check for any other purpose. The process of accessing the NICS for the purpose of conducting a NICS background check is initiated by an FFL's contacting the FBI NICS Operations Center (by telephone or electronic dial-up access) or a POC. FFLs in each state will be advised by the ATF whether they are required to initiate NICS background checks with the NICS Operations Center or a POC and how they are to do so.

**(b)** Access to the NICS through the FBI NICS Operations Center. FFLs may contact the NICS Operations Center by use of a toll-free telephone number, only during its regular business hours. In addition to telephone access, toll-free electronic dial-up access to the NICS will be provided to FFLs after the beginning of the NICS operation. FFLs with electronic dial-up access will be able to contact the NICS 24 hours each day, excluding scheduled and unscheduled downtime.

**(c)**

**(1)** The FBI NICS Operations Center, upon receiving an FFL telephone or electronic dial-up request for a background check, will:

**(i)**Verify the FFL Number and code word;

**(ii)**Assign a NICS Transaction Number (NTN) to a valid inquiry and provide the NTN to the FFL;

**(iii)**Search the relevant databases (i.e., NICS Index, NCIC, III) for any matching records; and

**(iv)**Provide the following NICS responses based upon the consolidated NICS search results to the FFL that requested the background check:

**(A)**"Proceed" response, if no disqualifying information was found in the NICS Index, NCIC, or III.

**(B)**"Delayed" response, if the NICS search finds a record that requires more research to determine whether the prospective transferee is disqualified from possessing a firearm by Federal or state law. A "Delayed" response to the FFL indicates that the firearm transfer should not proceed pending receipt of a follow-up "Proceed" response from the NICS or the expiration of three business days (exclusive of the day on which the query is made), whichever occurs first. (Example: An FFL requests a NICS check on a prospective firearm transferee at 9:00 a.m. on Friday and shortly thereafter receives a "Delayed" response from the NICS. If state offices in the state in which the FFL is located are closed on Saturday and Sunday and open the following Monday, Tuesday, and Wednesday, and the NICS has not yet responded with a "Proceed" or "Denied" response, the FFL may transfer the firearm at 12:01 a.m. Thursday.)

**(C)**"Denied" response, when at least one matching record is found in either the NICS Index, NCIC, or III that provides information demonstrating that receipt of a firearm by the prospective transferee would violate *18 U.S.C. 922* or state law. The "Denied" response will be provided to the requesting FFL by the NICS Operations Center during its regular business hours.

**(2)** None of the responses provided to the FFL under paragraph (c)(1) of this section will contain any of the underlying information in the records checked by the system.

**(d)** Access to the NICS through POCs. In states where a POC is designated to process background checks for the NICS, FFLs will contact the POC to initiate a NICS background check. Both ATF and the POC will notify FFLs in the POC's state of the means by which FFLs can contact the POC. The NICS will provide POCs with electronic access to the system virtually 24 hours each day through the NCIC communication network. Upon receiving a request for a background check from an FFL, a POC will:

**(1)**Verify the eligibility of the FFL either by verification of the FFL number or an alternative POC-verification system;

**(2)**Enter a purpose code indicating that the query of the system is for the purpose of performing a NICS background check in connection with the transfer of a firearm; and (3) Transmit the request for a background check via the NCIC interface to the NICS.

**(e)** Upon receiving a request for a NICS background check, POCs may also conduct a search of available files in state and local law enforcement and other relevant record systems, and may provide a unique State-Assigned Transaction Number (STN) to a valid inquiry for a background check.

**(f)** When the NICS receives an inquiry from a POC, it will search the relevant databases (i.e., NICS Index, NCIC, III) for any matching record(s) and will provide an electronic response to the POC. This response will consolidate the search results of the relevant databases and will include the NTN. The following types of responses may be provided by the NICS to a state or local agency conducting a background check:

**(1)**No record response, if the NICS determines, through a complete search, that no matching record exists.

**(2)**Partial response, if the NICS has not completed the search of all of its records. This response will indicate the databases that have been searched (i.e., III, NCIC, and/or NICS Index) and the databases that have not been searched. It will also provide any potentially disqualifying information found in any of the databases searched. A follow-up response will be sent as soon as all the relevant databases have been searched. The follow-up response will provide the complete search results.

**(3)**Single matching record response, if all records in the relevant databases have been searched and one matching record was found.

**(4)**Multiple matching record response, if all records in the relevant databases have been searched and more than one matching record was found.

**(g)** Generally, based on the response(s) provided by the NICS, and other information available in the state and local record systems, a POC will:

**(1)**Confirm any matching records; and

**(2)**Notify the FFL that the transfer may proceed, is delayed pending further record analysis, or is denied. "Proceed" notifications made within three business days will be accompanied by the NTN or STN traceable to the NTN. The POC may or may not provide a transaction number (NTN or STN) when notifying the FFL of a "Denied" response.

**(h)** POC Determination Messages. POCs shall transmit electronic NICS transaction determination messages to the FBI for the following transactions: open transactions that are not resolved before the end of the operational day on which the check is requested; denied transactions; transactions reported to the NICS as open and later changed to proceed; and denied transactions that have been overturned. The FBI shall provide POCs with an electronic capability to transmit this information. These electronic messages shall be provided to the NICS immediately upon communicating the POC determination to the FFL. For transactions where a determination has not been communicated to the FFL, the electronic messages shall be communicated no later than the end of the operational day on which the check was initiated. With the exception of permit checks, newly created POC NICS transactions that are not followed by a determination message (deny or open) before the end of the operational day on which they were initiated will be assumed to have resulted in a proceed notification to the

FFL. The information provided in the POC determination messages will be maintained in the NICS Audit Log described in § 25.9(b). The NICS will destroy its records regarding POC determinations in accordance with the procedures detailed in § 25.9(b).

**(i)** Response recording. FFLs are required to record the system response, whether provided by the FBI NICS Operations Center or a POC, on the appropriate ATF form for audit and inspection purposes, under 27 CFR part 178 recordkeeping requirements. The FBI NICS Operations Center response will always include an NTN and associated "Proceed," "Delayed," or "Denied" determination. POC responses may vary as discussed in paragraph (g) of this section. In these instances, FFLs will record the POC response, including any transaction number and/or determination.

**(j)** Access to the NICS Index for purposes unrelated to NICS background checks required by the Brady Act. Access to the NICS Index for purposes unrelated to NICS background checks pursuant to *18 U.S.C. 922*(t) shall be limited to uses for the purposes of:

**(1)**Providing information to Federal, state, tribal, or local criminal justice agencies in connection with the issuance of a firearm-related or explosives-related permit or license, including permits or licenses to possess, acquire, or transfer a firearm, or to carry a concealed firearm, or to import, manufacture, deal in, or purchase explosives;

**(2)**Responding to an inquiry from the Bureau of Alcohol, Tobacco, Firearms, and Explosives in connection with a civil or criminal law enforcement activity relating to the Gun Control Act (18 U.S.C. Chapter 44) or the National Firearms Act (26 U.S.C. Chapter 53); or,

**(3)**Disposing of firearms in the possession of a Federal, state, tribal, or local criminal justice agency.

## Statutory Authority

**AUTHORITY NOTE APPLICABLE TO ENTIRE PART:**

Public Law 103-159, *107 Stat. 1536, 49 U.S.C. 30501*-30505; Public Law 101-410, *104 Stat. 890,* as amended by Public Law 104-134, *110 Stat. 1321.*

## History

*[63 FR 58303, 58308,* Oct. 30, 1998; *69 FR 43892, 43900,* July 23, 2004; *79 FR 69047, 69051,* Nov. 20, 2014]

# Exhibit B

# FTC ENFORCEMENT AND PROCEDURE

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COMPLETED FTC INVESTIGATIONS AND REPORTS—Continued

[The next page is 17,011.]

# Antitrust and Trade Law Enforcement by Federal Trade Commission

[¶ 9500]

## Federal Trade Commission

The Federal Trade Commission (FTC) is the primary federal administrative agency charged with enforcement of the antitrust and trade regulation laws. Together with the Antitrust Division of the Department of Justice, it has direct enforcement authority for the Clayton Act, and it can reach Sherman Act type violations through its broad jurisdiction over "unfair" matters.

The FTC's first function is to enforce the FTC Act, which bans unfair methods of competition and unfair or deceptive acts or practices, and the Clayton Act, which bans activities ranging from price discrimination to mergers. In addition to enforcing these basic laws, the FTC has extensive enforcement activities under the federal labeling laws dealing with textiles, furs, and wool, and under the Fair Packaging and Labeling Act. Further, it has responsibilities under the truth-in-lending and fair credit reporting laws.

### Organization

The FTC organized itself for the '70s around its two broad areas of interest—antitrust and consumer protection. Two operating bureaus, the Bureau of Competition and the Bureau of Consumer Protection, carry out most of the activities pertinent to these two general categories. A Bureau of Economics—a staff bureau—serves the Commission's research and statistical needs.

The functions of the agency—adjudication, rulemaking, investigations, and guidance—are carried out through the appropriate bureau.

### Investigations

The FTC has broad investigative authority serving its rule-making, adjudicative, and reporting activities. The source of the authority is the FTC Act. It authorizes the agency to gather and compile information, and to investigate the organization, business, conduct, practices, and management of any person, partnership, or corporation engaged in or affecting commerce; to investigate compliance with antitrust decrees; to investigate and report facts relating to any alleged violation of the antitrust laws by any corporation, upon the direction of the President, or either House of Congress; and to investigate and make recommendations, upon the application of the Attorney General, for the readjustment of the business of any corporation alleged to be violating the antitrust laws.

The investigative function is effectuated through subpoenas for witnesses and documents, access rights, and the power to require persons, partnerships, or corporations to report periodically and specially. These may be enforced by the courts, subject to penalties for noncompliance.

## Cease and Desist Order Proceedings

The backbone of the FTC's enforcement of the antitrust and trade regulation laws is the cease and desist order. Proceedings leading to these orders can be complex and tortuous—from the filing of the formal complaint to the exhaustion of the rights of court review. Extensive rules of practice govern much of these proceedings, subject, of course, to the Administrative Procedure Act and, in turn, to the strictures of constitutional due process.

Orders to cease and desist are enforceable under threat of civil penalties (cash), court injunctions, and contempt citations for violation of the latter.

The FTC also has the power in certain cases to obtain preliminary injunctions prior to adjudicating its administrative complaint.

## Settlement Procedures

The FTC, as do the courts, prefers settlements in its efforts to remedy violations. To this end it has established a consent order procedure. When the agency believes that a company is violating a law, a complaint and cease-and-desist order will be drafted and the company advised of the fact. Upon notice, the company will be given the opportunity to settle by way of a consent order, which can be negotiated. If a settlement is agreed upon, the complaint and order will be filed. The order has the same effect as to compliance by the settling party as one entered after a formal trial, although no violation of the law is admitted. If the settlement opportunity fails, the formal complaint will issue, perhaps with modifications in the charges or in the order appended to it. The consent order procedure allows both the FTC and the alleged violator to avoid litigation.

Another settlement procedure, the acceptance of assurances of voluntary compliance, was formally abandoned by the FTC in 1977. This assurances-acceptance technique replaced an older method of enforcement by stipulation, which was discontinued in 1961.

## Regulation, Guidance and Advice

Other FTC devices for obtaining compliance with the laws administered by the agency include rule-making, industry guides, advisory opinions, and consumer education.

Trade regulation rules, designed for particular industries, attempt to pinpoint illegal practices in those industries by the issuance of rules upon which the FTC would rely in prosecuting cases.

Guides—"industry guides" and (formerly) trade practice rules—are issued by the agency with the idea of informing businessmen and others of the FTC's view of the law as it applies to the situations covered. Most guides are industrywide in scope, dealing with one or more specific problems of the industry (for example, guides cover the use of the word "free" in the sale of photographic film and film processing). Some guides focus on practices, rather than

an industry (for example, the guides against discriminatory promotional allowances and services, which are universally applicable).

Advisory opinions will be issued to businessmen upon request, when appropriate, to advise them on the legality of a proposed course of action. These may be useful both to persons who have never dealt with the FTC and to those who are subject to cease and desist orders. The agency publishes the opinions in full text, together with the name of the requesting party.

Consumer information is considered an important part of the FTC's operations. This is undertaken through publication of written materials and through liaison and committee relationships with local enforcement agencies, public and consumer representatives, and other interested persons. The Washington headquarters and the field offices both engage in these activities.

### Rules and Regulations

The complete texts of the Federal Trade Commission rules and regulations applicable to its functions (other than truth-in-lending and fair credit reporting) are reported in this division. These are essential to completing the requisites for understanding and applying the applicable rules in the Federal Trade Commission's enforcement of the federal antitrust and trade regulation law in all phases.

## Summaries of FTC Investigations

Summaries of pending and completed FTC investigations are collected in this division beginning at ¶ 10,000.

[The next page is 17,021.]

# FTC ENFORCEMENT

## ADMINISTRATION AND ORGANIZATION

### Functions



### [¶ 9551] Enforcement of Antitrust and Trade Regulation Laws

The Federal Trade Commission, created in 1914 by the Federal Trade Commission Act, has as its principal function the enforcement of the prohibitions of the Federal Trade Commission Act and the Clayton Act, as amended by the Robinson-Patman Act. As stated in former rules, the Federal Trade Commission was established "to protect business and the public against unfair methods of competition and to prevent practices which would lessen competition or tend to create monopoly."

Specifically, the FTC is authorized to enforce Section 5 of the Federal Trade Commission Act, which prohibits unfair methods of competition and unfair or deceptive acts or practices; Section 12 of the FTC Act, which prohibits the false advertisement of food, drugs, devices, and cosmetics; and Sections 2, 3, 7, and 8 of the Clayton Act, which prohibit price and other discriminations, exclusive dealing and similar arrangements, corporate acquisitions of stock or assets, and interlocking directorates. Also, the FTC enforces the Wool Products Labeling Act, Fur Products Labeling Act, Textile Fiber Products Identification Act, and Fair Packaging and Labeling Act as to certain products. These laws are enforced by the FTC through the issuance of cease and desist orders, whether litigated or by consent.

The FTC has been assigned specific enforcement responsibilities in the area of consumer credit protection under the Fair Credit Reporting Act, the Truth in Lending Act and the Equal Credit Opportunity Act, each of which is a title of the Consumer Credit Protection Act (for coverage of these laws see CCH's CONSUMER CREDIT GUIDE), and has responsibility for product disclosure labels for appliance efficiency standards under the Energy Policy Conservation Act of 1975 (the Act is covered in CCH's ENERGY MANAGEMENT REPORTS). These responsibilities are in addition to the agency's efforts under its general enforcement powers in the area of consumer practices, which are covered in the "Misrepresentation" division of Volume 2.

Also, the FTC is authorized to initiate court actions, as distinguished from its administrative proceedings, generally to obtain temporary or preliminary relief for violation of any provision of law enforced by the agency and specifically for the following purposes: to enjoin dissemination of false advertisements of food, drugs, devices, or cosmetics (Federal Trade Commission Act, Section 13(a)); to enjoin violations of the wool, fur, and textile products labeling acts (Wool Products Labeling Act, Section 7(b), Fur Products Labeling Act, Section 9(b), and Textile Fiber Products Identification Act, Section 8); and for seizure and confiscation of wool or fur products (Wool Products Labeling Act, Section 7(a), and Fur Products Labeling Act, Section 9(a)(1)).

To obtain voluntary compliance with the laws it enforces, the FTC promulgates trade regulation rules and industry guides covering practices in a specific industry or covering designated general practices.

The Federal Trade Commission's authority to enforce Sections 2, 3, 7, and 8 of the Clayton Act is based on Section 11 of the Clayton Act. The FTC's jurisdiction to enforce these provisions of the Clayton Act is concurrent with the power of the Department of Justice to enforce the provisions in the federal district courts. For example, in a proceeding to enforce Section 8 of the Clayton Act, the Supreme Court held that the FTC's jurisdiction to enforce that provision of the Clayton Act is not exclusive, in view of Section 15 of the Clayton Act which vests the federal district courts with jurisdiction to prevent and restrain violations of the Clayton Act (.213). Thus, as to these provisions of the law, there is dual enforcement—by the FTC and the Department of Justice. As a matter of practice, however, the majority of governmental proceedings to enforce these sections of the Clayton Act are initiated by the Federal Trade Commission, especially in view of the FTC's enforcement of Sections 2(a)-2(f) of the Clayton Act.

Issues regarding court action against FTC proceedings are included here. See also ¶ 9693 and 9711.

Attacks against the FTC's combined roles of complainant, prosecutor, and judge have been rejected (.53).

**Annotations to ¶ 9551 Appear Topically Below, as Follows:**



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**.21 Clayton Act enforcement.**—The Federal Trade Commission pointed out that authority to enforce compliance with the Clayton Act is by virtue of Section 11 of the Clayton Act vested in the Federal Trade Commission with the following exceptions:

(1) The Interstate Commerce Commission has authority to enforce compliance by common carriers subject to the Interstate Commerce Act.

(2) The Federal Communications Commission has authority to enforce compliance in cases applicable to common carriers engaged in wire or radio communication or radio transmission of energy.

(3) The Federal Reserve Board has authority to enforce compliance where the Act is applicable to banks, banking associations, and trust companies. FTC release dated August 20, 1936.

**.211** It was unobjectionable in an answer to a suit under Section 7 of the Clayton Act to allege that it would appear that compliance with the section could be enforced only by the Federal Trade Commission. *U. S. v. Warner Brothers Pictures, Inc.* (DC N. Y. 1930).

**.212** The Commission's jurisdiction to enforce Section 8 of the Act is not exclusive. Section 15 of the Act provides that the district courts are vested with jurisdiction to prevent and restrain violations of the Act, and cases have spoken of Congress' design to provide a scheme of dual enforce-

ment for the Clayton Act. The district court properly entertained suits by the United States to enjoin violations. *U. S. v. W. T. Grant Co.* (U. S. Sup. Ct. 1953) 1953 TRADE CASES ¶ 67,493, 345 U. S. 629, 73 S. Ct. 894.

**.213** A trial court did not have jurisdiction to determine whether the FTC must make a finding that the issuance of a complaint challenging brokerage payments is in the public interest. There is nothing in the language of Secs. 2(c) and 11 of the Clayton Act, in distinction to Sec. 2(a) of the Clayton Act and Sec. 5 of the FTC Act, that requires a finding that the issuance of the complaint be in the public interest. While the overall policy of the FTC may be directed toward matters that affect the public, any evaluation by the courts in terms of such policies may be made only after all the evidence is in and the Commission has issued a final order. *Jewel Companies, Inc. v. FTC*, (CA-7; 1970) 1970 TRADE CASES ¶ 73,315, 432 F. 2d 1155 (FTC Dkts. 8786-8790).

**.25 Declaratory judgment as to FTC authority.**—A suit for a declaratory judgment that the FTC has no authority to determine the legality of language used on plaintiff's labels was dismissed because the administrative remedy, the trial of a complaint before the FTC, had not been exhausted. A federal district court has no jurisdiction to issue a declaratory judgment as to the FTC's authority to act. *Miles Laboratories Inc. v. FTC* (DC D. C. 1943) 50 F. Supp. 434; affirmed (CA D. C. 1944) 1944-1945 TRADE CASES ¶ 57,206, 140 F. 2d 683 (FTC Dkt. 4993).

**.251** The FTC's statement of policy as to the effect of the 1959 amendment to the Clayton Act by P. L. 86-107, to the effect that the FTC would apply the law retroactively, created a justiciable controversy properly reviewable by declaratory judgment procedures. This procedure does not conflict with the review procedures otherwise provided under the Clayton Act. *FTC v. Nash-Finch Co.* (CA D. C. 1961) 1961 TRADE CASES ¶ 69,929, 288 F. 2d 407.

**.31 Injunctive power against FTC proceedings.**—The Circuit Court of Appeals has no power to prevent the FTC from ordering the taking of testimony touching the validity of a patent as it is not an order to cease and desist from unfair methods of competition, the authority to review which is given to the court by the Act. *Nulomoline Company v. FTC* (CCA-2; 1918) 254 F. 988 (FTC Dkt. 29).

**.311** In a suit to enjoin the FTC from prosecuting a complaint under Section 5 of the FTC Act, the court dismissed the bill for injunction against the FTC's activities. *Hurst & Son v. FTC* (DC Va. 1920) 268 F. 874 involving Dkt. 613.

**.312** To the same effect is *Carter Products, Inc. v. FTC* (DC D. C. 1943) involving Dkt. 4970 (a later cease and desist order set aside in *Carter Products, Inc. v. FTC* (CA-9; 1953) 1953 TRADE CASES ¶ 67,421, 201 F. 2d 446; judgment of CA-9 vacated and remanded (U. S. Sup. Ct. 1953) 1953 TRADE CASES ¶ 67,582, 346 U. S. 327 (FTC Dkt. 1956).)

**.313** The special jurisdiction vested in the Circuit Court of Appeals by the FTC Act is limited to the exercise of the power to enforce, set aside, or modify the final orders of the FTC, and does not include the power to enjoin the FTC's proceedings pending final order, either on the question of its jurisdiction in the premises, or otherwise. *Chamber of Commerce of Minneapolis v. FTC* (CC-8; 1922) 280 F. 45 (FTC Dkt. 694) (final order reviewed (CCA-8; 1926)).

**.314** An injunction "based upon the well-recognized principle that, where the terms of the statute are so expressed that the only avenue open to test its validity is through disobedience of a criminal statute, it amounts to a denial of a hearing, a want of due process of law," was upheld on special appeal in *FTC v. Millers' Natl. Federation* (CA D. C. 1927) 23 F. 2d 968. When the same case came up, on second appeal, however, the court reversed the lower court, holding that the matter could be determined in a proceeding when the FTC invoked the aid of the proper district court to enforce its order. *FTC v. Millers' Natl. Federation* (CA D. C. 1931) 47 F. 2d 428.

**.315** Respondent, prior to trial before the FTC, applied to a court for a capital reorganization and obtained a stay of all proceedings then pending against it. Respondent applied for an injunction to restrain the FTC from further action, but the court decreed that the stay order exempted proceedings on behalf of the FTC, disallowed the application for injunction, and directed respondent's officers to appear and testify before the FTC. *Re Englander Spring Bed Co.* (DC N. Y. 1936) (FTC Dkt. 2602).

**.316** Injunctive relief to restrain proceedings before the FTC was denied where judicial review of any final disposition of the FTC afforded an adequate remedy at law. *Ritholz v. March* (CA D. C. 1939) 105 F. 2d 937 (FTC Dkt. 3143).

Similarly.—*Crown Zellerbach Corp. v. FTC* (CCA-9; 1946) 1946-1947 TRADE CASES ¶ 57,487, 156 F. 2d 927 (FTC Dkt. 5421).

**.317** An injunction to restrain the FTC from holding hearings upon a complaint issued by it, on the ground that the proceeding was *res judicata* by reason of a prior decision of the court was denied for the reason that the court had no power under the statute to interfere with "the taking of

testimony and the finding of facts essential to the making of an order." *Sheffield Silver Co. v. FTC* (CCA-2; 1940) (no opinion) (FTC Dkt. 4000).

.318 Similarly.—*Aron v. FTC* (DC Pa. 1943) 50 F. Supp. 289, dismissing a suit to enjoin proceedings in Dkt. 4808.

.319 A United States District court has no jurisdiction to enjoin proceedings of the Commission on complaints issued under Section 3, since exclusive jurisdiction over such matters is given by the Clayton Act to the Commission in the first instance, and to the appropriate circuit court of appeals to review any order entered by the Commission. *Tubular Rivet & Stud Co. v. Ayres* (DC D. C. 1941); appeal dismissed (CA D. C. 1942) (FTC Dkt. 4113).

.32 An injunction to restrain the FTC from enforcing cease and desist orders in Dkts. 4278, 4879, 5554, 5557, 5560, and 5736 was denied for lack of jurisdiction. *Noel v. FTC* (DC D. C. 1954).

.321 In an action to enjoin an examiner from holding hearings he had scheduled on the ground that an order issued by the examiner was an arbitrary and capricious abuse of discretion and denied the company due process of law, a district court dissolved a temporary restraining order on grounds that company had not exhausted the administrative remedies provided by the FTC Act; that the administrative remedies provided by the FTC Act afforded the company due process of law; that the preliminary procedural and intermediate action or rulings of the FTC and its examiner, of which the company complains, were all reviewable by the Court of Appeals upon its review of the final agency action of the FTC; and that a district court was without jurisdiction to interfere with or enjoin any steps or action being taken by the FTC in connection with its complaint and proceeding against the company, since the FTC Act expressly provided for judicial review of the FTC's action. *Holland Furnace Co. v. Purcell* (DC Mich. 1954) 1954 TRADE CASES ¶ 67,858, 125 F. Supp. 74 (FTC Dkt. 6203).

.322 The fact that the respondent in an FTC anti-merger proceeding would be embarrassed in its customer relations if required to exhaust its administrative remedy before challenging the Commission's jurisdiction was not sufficient to enjoin the FTC proceedings. *Lone Star Cement Corp. v. FTC* (CA-9; 1964) 1964 TRADE CASES ¶ 71,322, 339 F. 2d 505 (FTC Dkt. 8585).

.323 An FTC proceeding was not enjoined on allegations that FTC attorneys had cooperated with a former employee of the respondent in the theft of company documents, in violation of the company's constitutional rights against illegal search and seizure. The company had failed to question its former employee as to participation by FTC attorneys in the alleged theft when he testified in the FTC proceeding before a hearing examiner, and had offered no other evidence showing knowledge of, or participation in, the alleged theft by FTC attorneys, *Knoll Ass'n., Inc. v. Dixon* (DC N. Y. 1964) 1964 TRADE CASES ¶ 71,182, 232 F. Supp. 283. Subsequently, however, the FTC ordered that all documents in its possession relating to the circumstances under which the documents were allegedly stolen be produced for inspection and copying by the respondent, but denied a request for the return of the documents as premature (Dkt. 8549).

.324 A federal district court had jurisdiction to issue an injunction preventing the FTC from proceeding under a new complaint since entry of a consent order under an earlier complaint made it proper for the FTC to proceed only by reopening the earlier proceeding. *Elmo Division of Drive-X Co., Inc. v. Dixon* (CA D. C. 1965) 1965 TRADE CASES ¶ 71,370, 348 F. 2d 342 (FTC Dkt. 8615).

**.45 Mandate to require FTC to take jurisdiction.**—A petition for a writ of mandamus directing the FTC to take jurisdiction of charges originally made against the International Association of Ice Cream Manufacturers and subsequently stricken was denied without opinion. *Natl. Assn. of Counter Freezer Manufacturers v. FTC* (D. C. Sup. Ct. 1936); appeal dismissed (CA D. C. 1936) (FTC Dkt. 2346 (closed)).

**.53 Multiple role as complainant, prosecutor, and judge.**—A challenge to the validity of the Act because it combines in the Commission the functions of complainant, prosecutor and judge was overruled. *FTC v. Klesner* (U. S. Sup. Ct. 1929) 280 U. S. 19 (FTC Dkt. 696); *Chamber of Commerce of Minneapolis v. FTC* (CCA-8; 1926) 13 F. 2d 673 (FTC Dkt. 694); *FTC v. McLean & Son* (CA-7; 1936) 1932-1939 TRADE CASES ¶ 55,123, 84 F. 2d 910; (CCA-7; 1938) 1932-1939 TRADE CASES ¶ 55,174, 94 F. 2d 802 (FTC Dkt. 2264); *Natl. Harness Mfrs. Assn. v. FTC* (CCA-6; 1920) 268 F. 705 (FTC Dkt. 16); *Sears, Roebuck & Co. v. FTC* (CCA-7; 1919) 258 F. 307 (FTC Dkt. 80); *FTC v. Martoccio Co.* (CCA-8; 1937) 1932-1939 TRADE CASES ¶ 55,148, 87 F. 2d 561 (FTC Dkt. 2283).

.531 A manufacturer of automotive parts could not enjoin an antimerger proceeding pending before the FTC by claiming that there had been a commingling of the functions of prosecution and adjudication because an FTC staff economist had presented information resulting in another complaint involving the same industry and possibly the same practices. These facts did not constitute a violation of the doctrine of

separation of functions; at most, the charge was that the Commissioners were prejudiced or biased because of such contacts. *Maremont Corp. v. FTC* (CA-7; 1970) 1970 TRADE CASES ¶ 73,310 (FTC Dkt. 8763).

.71 **Quasi-judicial tribunal.**—Orders of the Federal Trade Commission are not rendered legislative in character by the 1938 amendment of Section 5 of the Federal Trade Commission Act. The Commission is a quasi-judicial tribunal and its orders are administrative orders as distinguished from judicial decrees. The contention that an order of the Commission prohibiting a candy lottery is invalid as a discriminatory legislative regulation was, therefore, without merit. The Act applies equally to all persons in like conditions and the amendment did not change the Commission's order into a legislative act but merely changed the Government's remedy for its enforcement by transferring the power to enforce from the Commission to the Department of Justice and the jurisdiction of such proceeding from the Circuit Courts of Appeals to the United States District Courts. *Natl. Candy Co. v. FTC* (CCA-7; 1939) 1932-1939 TRADE CASES ¶ 55,224, 104 F. 2d 999 (FTC Dkt. 1802).

.81 **Robinson-Patman Act enforcement.**—"Question. Who will enforce this law [Robinson-Patman Act]?

"Answer. Since this will be an amendment to the Clayton Act, it is backed by all of the remedies afforded by the Clayton Act:

"1. By cease-and-desist order of the Federal Trade Commission, enforced if necessary by order of the Federal courts, and punishable for its disobedience.

"2. By injunction suit, prosecuted by the Attorney General.

"3. By similar suit for injunction or damages prosecuted by anyone injured by its violation."—Mr. Patman, Extension of Remarks in the House of Representatives, concerning H. R. 8442, 80 Congressional Record 7760, May 21, 1936.

## [¶ 9552] Investigatory, Rulemaking, and Other Functions

The Federal Trade Commission has investigatory, rulemaking, and other functions apart from its direct law enforcement activities.

The FTC is authorized under the FTC Act to make investigations as to the following matters: organization, business, conduct, practices, and management of persons, partnerships, or corporations; manner in which final decrees entered against corporations in antitrust suits brought by the United States have been carried out; alleged violations of the antitrust laws by corporations (at the direction of the President or Congress); readjustment of business of a corporation alleged to be violating antitrust laws (upon application of Attorney General); and trade conditions in and with foreign countries. Also, the FTC is authorized to determine whether associations engaged in export trade are violating the law (Webb Export Trade Associations Act, Section 5).

The FTC has authority to issue rules and regulations for the purpose of carrying out the provisions of the Federal Trade Commission Act; rules and regulations for the administration and enforcement of the Wool Products Labeling Act, Fur Products Labeling Act, Textile Fiber Products Identification Act, and Fair Packaging and Labeling Act as to certain products; and rules and regulations for forms of continuing guaranties as to wool and fur products, flammable fabrics, and textile fiber products. It has authority to establish certain classifications of wool products, under the Wool Products Labeling Act; a register setting forth names of hair, fleece, and fur-bearing animals to be known as the Fur Products Name Guide, under the Fur Products Labeling Act; and generic names of manufactured textile fibers and textile fiber content tolerances under the Textile Fiber Products Identification Act.

Furthermore, it can establish quantity limit rules, specifying quantity limits as to commodities where available purchasers are so few as to render price differentials on account thereof discriminatory, under the Clayton Act.

The FTC has reporting responsibilities, too. It is authorized to investigate, upon the direction of the President or Congress, and report the facts relating to any alleged violations of the antitrust laws by any corporation;

to make annual and special reports to Congress and to submit recommendations for additional legislation; and to report to Congress, with recommendations, concerning trade conditions in and with foreign countries (FTC Act, Section 6(d), (f), and (h)).

Whenever the FTC has reason to believe that a person is liable to a penalty for violation of a cease and desist order or dissemination of a false advertisement of food, drugs, devices, or cosmetics, it is directed to certify the facts to the Attorney General; absent action by him, the FTC can initiate proceedings (FTC Act, Section 16).

After investigation by the FTC, on its own initiative or on application of the Attorney General, of the manner in which a decree entered against a corporation in an antitrust suit brought by the United States has been carried out, the FTC is directed to transmit a report of its findings and recommendations to the Attorney General (FTC Act, Section 6(c)). On application of the Attorney General, the FTC is to make recommendations for the readjustment of the business of a corporation alleged to be violating the antitrust laws (FTC Act, Section 6(e)). If an export association fails to comply with the recommendations of the FTC, it is to refer its findings and recommendations to the Attorney General (Webb Export Trade Associations Act, Section 5). Also, whenever the FTC believes that a person is guilty of a misdemeanor under the wool, fur, and textile products labeling acts, the FTC is directed to certify all pertinent facts to the Attorney General (Wool Products Labeling Act, Section 10, Fur Products Labeling Act, Section 11(b), and Textile Fiber Products Identification Act, Section 11).

Inspections, analyses, tests, and examinations may be made by the FTC as to the following products: wool (Wool Products Labeling Act, Section 6(a)); fur (Fur Products Labeling Act, Section 8(c)(1)); and textiles (Textile Fiber Products Identification Act, Section 7(d)).

Among the more important miscellaneous authorities and duties of the FTC are the following: to serve as master in chancery to ascertain and report appropriate forms of decrees in antitrust equity suits brought by the Attorney General (FTC Act, Section 7); to issue and register names or other identification of persons who manufacture or distribute fur and textile fiber products (Fur Products Labeling Act, Section 4(2)(E), and Textile Fiber Products Identification Act, Section 4(b)(3)); to accept on file continuing guaranties applicable to fur and textile fiber products (Fur Products Labeling Act, Section 10(a), and Textile Fiber Products Identification Act, Section 10(a)); to make surveys to determine factors which might promote undue concentration of economic power in the course of the administration of the Defense Production Act, and to review voluntary industry agreements (Defense Production Act, Section 708); and to apply to cancel registrations of trade-marks on specified grounds (Lanham Trade-Mark Act, Section 14).

**.50 World War I duties.**—The Commission had authority to issue licenses under patents owned by enemy aliens during World War I. See *Farbewerke v. Chemical Foundation* (U. S. Sup. Ct. 1931) 283 U. S. 152; *U. S. v. Chemical Foundation, Inc.* (U. S. Sup. Ct. 1926) 272 U. S. 1.

.51 The Federal Trade Commission has acted as umpire in determining the amount due for war supplies. See *Helvetia Milk Condensing Co. v. U. S.* (U. S. Ct. Claims 1930) 39 F. 2d 1012.

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